Supreme Court, U.S.
F I L E D

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No. 99-____

In the Supreme Court of the United States

OCTOBER TERM, 1999

HAROLD LEWIS,
Petitioner

v.

KMART CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARY GILIBERTI
BAZELON CENTER FOR
MENTAL HEALTH LAW
1101 15th Street, N.W., #1212
Washington, D.C. 20005
(202) 467-5730

VICTOR M. GLASBERG
VICTOR M. GLASBERG
& ASSOCIATES
121 S. Columbus St.
Alexandria, VA 22314
(703) 684-1100

JERROLD J. GANZFRIED
Counsel of Record
KERRY L. ADAMS
JULIE B. GREENISEN
JOHN F. STANTON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
Harold Lewis

QUESTION PRESENTED

Whether the Americans With Disabilities Act permits discrimination based on a distinction between disabilities of mental and physical causation that lacks an actuarial or other non-discriminatory justification?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.[1]

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[1] Aetna Life Insurance Company was initially a defendant, but was dismissed from the case on motion for summary judgment in the district court, was not a party in the court of appeals, and is not a party to proceedings in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harold Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 180 F.3d 166. Appendix to Petition for Certiorari ("App.") 1a-13a. The district court's opinion denying respondent's Motion to Dismiss is reported at 982 F. Supp. 1158. App. 14a-38a. The district court's post-trial opinion finding that respondent had violated the Americans With Disabilities Act is reported at 7 F. Supp. 2d 743. App. 39a-54a.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1999. App. 57a. A timely petition for rehearing was denied on August 2, 1999. App. 55a-56a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title I of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101(a), 12101(b), 12112(a), 12112(b), and 12201(c), are set forth at App. 58a-62a.

STATEMENT OF THE CASE

1. In *Olmstead v. L.C.*, 119 S. Ct. 2176, 2186, n. 10 (1999), this Court expressly labeled "incorrect as a matter of precedent and logic" the excessively narrow definition of "discrimination" that the Fourth Circuit employed in this case.[2] As this Court explained, Congress "had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* at 2186. Contrary to this Court's pronouncement in *Olmstead* (and prior cases), the decision below held that the ADA does not reach "intragroup" discrimination that disfavors some members of a protected class in relation to others, even when there is no actuarial or other justification for the invidious disparity. This important issue involves vital federal statutes that may affect the families of virtually every employed person in the United

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[2] *Olmstead* was decided six days after the Fourth Circuit issued the decision below.

States. The issue has already arisen in dozens of cases in the lower federal courts, producing an array of judicial disagreement (*see* pages 19-21, *infra*). In these circumstances, review is warranted for this Court to bring uniformity and certainty to a frequently-recurring question with great practical significance.

2. Similar to *Olmstead,* this case involves the ADA's prohibition of discrimination against persons with mental disabilities based on unjustified distinctions within the protected class. Petitioner Harold Lewis was employed by Kmart Corporation for more than 10 years, during which time he held various management positions. App. 3a. In March 1995, at age 41, petitioner became totally disabled, *i.e.*, he was no longer able to work, due to a major medical depression. App. 40a.

While working at Kmart, petitioner participated in an employee-funded long-term disability (LTD) plan, paying his premiums from 1987 until the time his disability precluded further employment. App. 40a. Under the terms of the plan in effect at the time he became disabled and entitled to benefits, a worker would receive payments until age 65 for disabilities due exclusively to physical impairment. But, for disabilities deemed to be of "mental" origin, the plan imposed a two-year cap on payments. *Id.*

Petitioner began receiving long-term disability payments in September 1995, but they were terminated long before he reached age 65. *Id.* Applying the two-year cap on "mental" disabilities, the insurance provider ceased petitioner's disability payments in 1997, when petitioner was 43 years old. *Id.*

3. Petitioner filed suit in the United States District Court for the Eastern District of Virginia, alleging that Kmart had violated Title I of the Americans With Disabilities Act. App. 16a.[3] The complaint alleged that the Kmart disability policy impermissibly discriminated against persons disabled by mental illness, because it provided inferior coverage for mental disabilities without actuarial or medical justification and in violation of state law. App. 16a, 44a.

In denying a motion to dismiss prior to trial, the district court expressly rejected Kmart's contention that the ADA merely requires that all employees be given equal access to an employer's benefit plan. The court also rejected Kmart's argument that the ADA does not prohibit discrimination among categories of disabilities (App. 36a):

> Both a decision to deny coverage on the basis of mental disability and to provide inferior coverage for mental disabilities target the mentally disabled for inferior treatment. In both cases, an insurer has subjected the mentally disabled individual to treatment inferior to that accorded to others solely on the basis of that individual's disability. As discussed above, the ADA clearly prohibits discrimination on the basis of disability absent some actuarial justification. Defendants' attempt to categorize such discrimination as

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[3] Jurisdiction in the district court rested on 28 U.S.C. § 1331. The complaint also alleged that the insurance provider, Aetna Life Insurance Company, had violated Title III of the Act. Aetna was later dismissed from the case based on statute of limitations grounds not applicable to Kmart. *Lewis v. Aetna Life Ins. Co.*, 993 F. Supp. 382 (E. D. Va. 1998).

> discrimination between categories of disability rather than discrimination between the disabled and the nondisabled fails here. Under defendants' logic, an employer could hire an employee with a physical disability over a more qualified employee with a mental disability, without violating the ADA, simply because both applicants were members of the protected class.

The key issue litigated at trial was whether any actuarial or other justification existed for the distinction in disability coverage. App. 41a. Although petitioner maintained that the burden was on Kmart to justify the discrimination in its policy through actuarial or other evidence, petitioner nevertheless presented evidence establishing that there was no such justification. CA Supp. App. 12. Petitioner's expert witnesses testified without contradiction that Kmart's distinction between mental and physical disabilities had no basis in sound medical or actuarial principles. Among other things, petitioner's unrefuted expert testimony demonstrated (1) the substantial overlap among illnesses traditionally considered to be physical in origin and those considered "mental" or "nervous" in origin; (2) the similar rates of success in diagnosing and treating mental and physical illnesses; and (3) the absence of information sufficient to justify, on an actuarial basis, different risk or cost categorizations for mental and physical disabilities. CA App. 443-50, 455-61, 473-75, 501-06.

Kmart offered no evidence -- actuarial, medical, or otherwise -- to justify the distinction in coverage. App. 45a. Instead, Kmart contended that the ADA permits employers to

discriminate at will among the disabled in providing benefits, at least where the plan has been approved by the applicable state authority. *Id.*

Following trial, the district court rejected Kmart's narrow reading of the ADA, and entered judgment in favor of petitioner. On a record where, as the court observed, Kmart had provided no actuarial justification for the cap on payments for mental illness, the court found that the violation of Title I of the ADA was manifest. App. 48a.[4] Based on that finding of liability, the district court issued a permanent injunction mandating the payment of monthly disability benefits to petitioner, to be continued until age 65 or until he is able to return to work, for a maximum of approximately $650,000. App. 52a-54a.

4. On Kmart's appeal of the final judgment to the United States Court of Appeals for the Fourth Circuit, under 28 U.S.C. §1291, petitioner argued, *inter alia,* that the ADA reaches discrimination among types of disabilities just as it prohibits discrimination between the disabled and the non-disabled. App. 10a. Given the importance and practical significance of the issue, the case generated substantial amicus participation on both sides, *see* App. 2a-3a, including an amicus brief filed by the Equal Employment Opportunity Commission, the federal agency charged with enforcement of

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[4] The court also rejected Kmart's defense under the so-called "safe harbor" provision of the ADA, 42 U.S.C. § 12201(c), which protects the decisions of a benefit plan sponsor such as Kmart "only to the extent that they are consistent with state law." App. 43a. Applicable Virginia law expressly prohibits distinctions in "the amount, extent, or kind of insurance coverage available to an individual . . . unless . . . based on sound actuarial principles." Va. Code Ann. § 38.2-508.

Title I of the ADA. The EEOC brief echoed and supported petitioner's argument in the strongest of terms, emphasizing that the language and purpose of the ADA demands that it be applied to instances of discrimination among the disabled, and not merely to discrimination between the disabled and non-disabled (EEOC Amicus Br. 25-26):

> There are important policy reasons for prohibiting the type of discrimination involved in this case. The anti-discrimination statutes are designed to eliminate the reliance on 'inaccurate and stigmatizing stereotypes' in employment decisionmaking. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). It is obvious that such stereotyping can occur even where the employer chooses between or among individuals of the same protected group, since an employer may prefer certain members of the group over others based on impermissible stereotypes about the appropriate behavior of members of that group (*e.g.*, in the case of women, that they are appropriately "feminine"; in the case of African-Americans, that they act "white"). *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Such 'intra group' discrimination is, if anything, even more pronounced in the disability context, given the wide variety of potentially disabling conditions covered under the ADA.

The Fourth Circuit reversed. The court of appeals repeatedly framed the issue before it as whether Title I of the ADA requires a long-term disability plan sponsored by a

private employer "to provide the same level of benefits for mental and physical disabilities." App. 6a, 9a, 12-13a. Viewing the issue from that perspective, the court concluded that the case was controlled by its recent decision in *Rogers v. Department of Health & Environmental Control*, 174 F.3d 431 (4th Cir. 1999) (holding that a state has no obligation under Title II of the ADA to provide the same level of benefits for mental and physical disabilities in any long-term disability plan offered).[5]

In broad fashion, the court held that a plan sponsor or administrator can discriminate with impunity in providing benefits to one group of disabled individuals as compared to another, and that it need not have any justification -- actuarial or otherwise -- for doing so. The court of appeals attributed its severely restrictive reading of the protections provided under the ADA to this Court's ruling in *Traynor v. Turnage*, 485 U.S. 535 (1988), a case involving the Rehabilitation Act of 1973, 29 U.S.C. § 794, and federal statutes affording certain benefits to veterans. *See* 38 U.S.C. § 3462(a)(1). In the Fourth Circuit's view, language in *Traynor* (drawn from the Court's reconciliation of two express federal statutory provisions) could be generalized to an inflexible rule of law that distinctions in benefits are always permissible and require no justification whatsoever.

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[5] Title II of the ADA, 42 U.S.C. § 12132, prohibits discrimination by a public entity against a qualified individual with a disability. The court of appeals noted there is "no material distinction" between Titles I and II for purposes of determining whether the provision of unequal benefits for mental as opposed to physical disabilities constitutes discrimination. App. 9a.

5. Six days later, in *Olmstead*, this Court rejected as contrary to precedent and logic, the fundamental premise of the Fourth Circuit's holding that "discrimination" under the ADA does not extend to discrimination *among* members of a protected class. Petitioner's timely petition for rehearing in this case provided the Fourth Circuit an opportunity to reconsider its decision in light of *Olmstead*. The petition for rehearing was summarily denied. App. 56a.

REASONS FOR GRANTING THE PETITION

The judgment below cannot be squared with this Court's intervening ruling in *Olmstead*. Under this Court's ruling, the ADA protects persons with mental disabilities from discrimination within the protected class, such as unjustifiably excluding people with mental disabilities from a wage-replacement benefit afforded persons disabled for other medical reasons. Rejecting the rationale of the Fourth Circuit here, and the dissent in *Olmstead*, this Court has recognized that the issue in ADA cases is not controlled by narrower interpretations of the earlier Rehabilitation Act. The more expansive ADA clearly bars discrimination between the mentally and physically disabled, even though both are within the class protected by the statute.

Olmstead is therefore dispositive on the only issue presented. In these circumstances, the Court may wish to consider summary reversal. At the very least, the Court should grant the petition, vacate the judgment and remand for reconsideration in light of *Olmstead*. The Fourth Circuit precluded just such reconsideration in denying rehearing without comment.

This case possesses other characteristics that make it ideally suited for certiorari. Respondent has had an unfettered opportunity to develop a full record at trial. Accordingly, this case presents a full post-trial record demonstrating that there is no medical or actuarial basis for respondent's disparate treatment of mental and physical disabilities. Moreover, the case presents a vital and recurring question arising under important federal anti-discrimination statutes that advance a critical national policy[6] and that affect millions of citizens and employers. As described below, the current disarray and disagreement among the lower federal courts on the single pure question of law presented in this case strongly show that this Court's review is needed.

I. THE RULING BELOW CONFLICTS WITH THIS COURT'S DECISION IN *OLMSTEAD* ON AN IMPORTANT LEGAL QUESTION

1. The Fourth Circuit's holding that the ADA prohibits only discrimination against disabled persons vis-à-vis nondisabled persons cannot survive *Olmstead*. In *Olmstead*, the plaintiffs were people with mental disabilities who contended that the state of Georgia had violated the ADA by keeping them institutionalized rather than providing

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[6] Legislative support for the ADA was overwhelming, transcending party affiliation, regional differences, and intergovernmental rivalries. The legislation passed both Houses of Congress by large margins, as the final conference report was adopted by a vote of 377-28 in the House and 91-6 in the Senate. The original bills passed in the House by 403-20 and in the Senate by 76-8. 1990 CONG. QTRLY. ALMANAC 447.

community-based care.[7] This Court explained that the "dissimilar treatment" complained of related to the need for persons with mental disabilities to relinquish their participation in the community in order to receive needed medical services, while persons without mental disabilities could receive needed medical services without making that sacrifice. 119 S. Ct. at 2187. Georgia argued, however, that this disparate treatment among the disabled was not an actionable violation of the ADA (*id.* at 2186):

> "'discrimination' necessarily requires uneven treatment of similarly situated individuals" and [the plaintiffs] had identified no comparison class, i.e., no similarly situated individuals given preferential treatment.

This Court rejected Georgia's narrow view of discrimination under the ADA. Moreover, the majority opinion emphatically rejected the dissent's contention that the Court was plowing new ground in considering the treatment of a member of a protected class as compared to another member of that class (119 S. Ct. at 2186 n.10):

> The dissent is driven by the notion that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class," post, at 1, (opinion of THOMAS, J.), that "our decisions construing various statutory

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[7] *Olmstead* addressed disparate treatment under Title II of the ADA, 119 S. Ct. at 2182. The issue under Title I is identical. *See* note 5, *supra*, and App. 9a.

> prohibitions against 'discrimination' have not wavered from this path," post, at 2, and that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group," post, at 4. The dissent is incorrect as a matter of precedent and logic.

In support of this proposition, the Court cited numerous prior cases in which discrimination between and among members of the protected class has been held to violate federal law. For example, *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), recognized that "intragroup" discrimination is actionable under the Age Discrimination in Employment Act:

> [The ADEA] does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.

Id. at 312 (emphasis in original). *O'Connor* and *Olmstead* find further support in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion of Brennan, J.) (holding that preference for those in a protected class, *i.e.*, women who "walk more femininely, talk more femininely, dress more femininely" is actionable Title VII discrimination because it is based on impermissible gender stereotypes); and

Connecticut v. Teal, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group").

Olmstead not only rejected the broad notion that distinctions between individuals in the same protected class cannot form the basis of a discrimination claim under any circumstances, it specifically ruled that such distinctions could violate the ADA: "We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than that put forward by the State of Georgia. 119 S. Ct. at 2186.[8]

In accordance with this Court's practice, it is clear that if the Fourth Circuit's decision had been issued earlier and this petition were filed while *Olmstead* remained pending, then the petition would have been held until the disposition of *Olmstead,* and, upon the issuance of the decision in *Olmstead,* the petition in this case would have been granted, the judgment below vacated, and the case remanded for the Fourth Circuit to reconsider in light of

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8 *See also id.* at 2192 (The ADA "can be understood . . . to prohibit[] distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services[.]") (Kennedy, J., concurring in the judgment). The Court also noted that the ADA was specifically designed to "step[] up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living." *Id.* at 2186-87 & n.11 (recounting previous federal laws providing for opportunities for persons with developmental disabilities and noting that the ADA's reach surpassed that of Rehabilitation Act).

Olmstead. But for the fortuity of timing (the decision below is dated six days prior to *Olmstead*), the same result should still obtain. The inconsistency with *Olmstead* on an essential underpinning of the Fourth Circuit's statutory interpretation fully warrants certiorari. Indeed, the present circumstances -- where an appellate decision on an important federal question conflicts with relevant decisions of this Court -- constitute one of the primary justifications for this Court to grant certiorari. *See* Sup. Ct. R. 10.

2. This case also warrants review because the decision below conflicts with and perpetuates misconceptions about this Court's prior opinions. For example, the reliance of the Fourth Circuit (and other courts of appeals)[9] on *Traynor v. Turnage*, 485 U.S. 535 (1985), is misplaced.

In *Traynor*, this Court considered whether the Rehabilitation Act repealed by implication an earlier statute in which Congress conferred the benefit of an extension of time for using veterans' educational benefits to persons "with a physical or mental disability," but not if the disability were due to "willful misconduct." 585 U.S. at 538. Under longstanding interpretations of the Veterans Administration, the term "willful misconduct" applied to a specific form of alcoholism, *i.e.*, alcoholism that was not "secondary to and a manifestation of an acquired psychiatric disorder." 485 U.S.

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[9] Like the Fourth Circuit, pre-*Olmstead* decisions of the Third, Sixth and Seventh Circuits relied on *Traynor* for the incorrect predicate that the ADA does not prohibit unjustified distinctions among disabled individuals or groups. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*,121 F.3d 1006 (6th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1084 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996).

at 538, n.2. This Court held that the Rehabilitation Act did not preclude such a disparity, or more precisely that the Rehabilitation Act did not impliedly repeal the existing law that allows for a difference in benefits between those disabled through no fault of their own and those disabled due to willful misconduct. 485 U.S. 535, 547-51.

In short, *Traynor* involved a conduct-based distinction that had long been justified and endorsed by Congress; it is not a generalized statement that cloaks unjustified, unsupportable discriminatory distinctions from scrutiny under the Rehabilitation Act (or any other statute). To the contrary, this Court's opinion in *Traynor* recognized that:

> it would arguably be inconsistent with § 504 [of the Rehabilitation Act] for Congress to distinguish among disabled veterans according to generalized determinations *that lack any substantial basis.*

485 U.S. at 550 (emphasis added).

Even with respect to the Rehabilitation Act, therefore, *Traynor* does not stand for the proposition upon which the Fourth Circuit relied. That reliance is even more misplaced with respect to the ADA, which affords greater protections against discrimination than did the Rehabilitation Act as it existed prior to 1992 amendment. Whereas the Rehabilitation Act's antidiscrimination proscription originally was "a single sentence attached to vocational rehabilitation legislation" (*Olmstead,* 119 S. Ct. at 2187 n.11), the ADA is far more comprehensive, and contains specific provisions governing the fair application of

insurance benefit plans. *See* 42 U.S.C. § 12201(c).[10] This Court correctly recognized that the Rehabilitation Act is a floor to the ADA's protections, not a ceiling as the Fourth Circuit suggested. *See Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (ADA must be construed as providing "at least as much protection" as the Rehabilitation Act). To the extent that the Fourth Circuit and other courts of appeals (*see* n. 9, *supra*), have taken language from *Traynor* and other cases out of context and created a blanket authorization for discrimination, they have misread this Court's decisions and thwarted the intent of Congress.[11]

II. THE DECISION BELOW EXACERBATES THE CURRENT STATE OF JUDICIAL DISARRAY ON AN IMPORTANT FEDERAL QUESTION

Kmart's plan is typical of many employer-provided long-term disability plans in imposing a cap of two years or less for disabilities caused even in part by mental illnesses.

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[10] *Traynor* was decided in 1988, under an earlier version of the Rehabilitation Act. In 1992, Congress amended the Rehabilitation Act to parallel the standards for employment discrimination—including the provisions governing non-discrimination in insurance—under the newly-promulgated ADA. *See* 29 U.S.C. § 794(d); *cf. Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 633-34 (6th Cir. 1999) (pre-1992 Rehabilitation Act cases must be re-examined in light of § 794(d) and ADA).

[11] The pre-*Olmstead* decisions of the courts of appeals also place undue reliance on *Alexander v. Choate*, 469 U.S. 287 (1985). *Choate* did not involve discrimination in access to benefits, or in the provision of benefits, at all. Instead, the Court determined that a state's generalized limitations on Medicaid payments, which imposed the same limits on all individuals but which were alleged to *affect* the disabled disproportionately, did not violate the Rehabilitation Act. *Choate* did not immunize discrimination among disabled individuals or groups even under the Rehabilitation Act, and certainly not under the ADA.

Nicole Martinson, *Inequality Between Disabilities: The Different Treatment of Mental Versus Physical Disabilities in Long-Term Disability Benefit Plans,* 50 BAYLOR L. REV. 361, 362 (1998).[12] It is not uncommon for such plans to contain other disability-based distinctions, such as provisions allowing for the re-employment of persons with physical disorders—but not for mental disabilities--if the person with the disability becomes medically able to work again. *Id.*

Given the lack of actuarial or medical justification, such distinctions contravene the fundamental purpose of the ADA—to eliminate "historic mistreatment, indifference, and hostility" directed at people with disabilities. *Olmstead,* 119 S. Ct. at 2191-92 (Kennedy, J., concurring in the judgment); *see also City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 461-64 (1985) (Marshall, J., concurring in part and dissenting in part) (recounting "lengthy and tragic history" of people with mental retardation).

Congress was fully cognizant of the stigmas, stereotypes and discrimination encountered by people with mental disabilities when it passed the ADA in 1990. In addition to numerous findings *in the statute* regarding the continued existence of discrimination against the disabled, Congress expressly declared that the purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress was also keenly aware of the inequities encountered by people with disabilities within the specific context of employment

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[12] Indeed, one of Kmart's defenses in the lower courts sought to exploit the extreme commonality of the plan's discriminatory features. Kmart 4th Cir. Br. (No. 98-2179) at 36.

benefits, and 42 U.S.C. §12112(b)(2) expressly precludes discrimination by an employer in the provision of such benefits.

Consistent with this explicit statutory directive -- and directly applicable to this case – the relevant Committee reports explain that a benefit plan will pass muster under the ADA *only* if the disparities or inequalities of benefits it provides are based upon sound actuarial data:

> Under the ADA, a person with a disability cannot be denied insurance *or be subject to different terms or conditions of insurance based on disability alone, if the disability does not impose increased risks*. . . . Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, *or limit the amount, extent, or kind of coverage available . . . solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience*.

H.R. Rep. No. 101-485 (II), at 136-37 (1990), *reprinted in*

1990 U.S. CODE CONG. & ADMIN. NEWS 303, 419-20 (emphasis added).[13]

Given this clear statutory mandate, it is no answer for respondent to argue that the decision below is consistent with holdings of three other courts of appeals (*see* n. 9, *supra*). First, as explained above, all of those decisions antedated *Olmstead* and misperceived prior decisions of this Court. *See* pages 10 - 16, *supra.* Moreover, those prior circuit court decisions actually expose substantial disagreement and disarray among the federal appellate judges. Sitting *en banc*, the Sixth Circuit split 8-5. *Parker*, 121 F.3d at 1006-07. The dissenters noted that under the ADA, "insurance practices, including the insurance industry's justification for its distinction between mental and physical disabilities, are fully protected to the extent they are in accord with sound actuarial principles, reasonably anticipated experience, and bona fide risk classification." *Id.* at 1022 (Merritt, J., dissenting). Similarly, Judge Alito disagreed with the Third Circuit's conclusion in *Ford* that disparities in benefits did not constitute prima facie discrimination, noting that "it would

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13 The same report later explains:

> Specifically, [§ 12201(c)] makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, *so long as the standards used are based on sound actuarial data and not on speculation*. . . . In sum, [the] ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.

H.R. Rep. No. 101-485 (III) at 70-71 (1990) *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 493-94(emphasis added).

seem to me that making [disability-based] distinctions does constitute discrimination in the most basic sense of the word." *Ford*, 145 F.3d at 615 (Alito, J., concurring in the judgment).

Contrary to the decision below, numerous district courts have applied the ADA to disability-based distinctions in insurance benefit plans. *See, e.g., Boots v. Northwestern Mutual Life Ins. Co.*, No. 98-625-JM (D.N.H. June 30, 1999) (identical facts as case *sub judice* and observing that *Ford, Parker* and *CNA* are inconsistent with *Olmstead*); *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557, 565-66 (D. Minn. 1998) (denial of coverage for mental disabilities violated ADA); *Esfahani v. Medical College*, 919 F. Supp. 832, 836 (E.D. Pa. 1996) (motion to dismiss denied when plaintiff alleged that disparities between coverage for mental and physical disabilities were not grounded in sound actuarial data). Other district courts have correctly recognized that denials or limitations of coverage based on disability must be justified by actuarial or other risk or cost allocation data under the ADA. *See, e.g., World Insurance Co. v. Branch*, 966 F. Supp. 1203, 1208 (N.D. Ga. 1997), *vacated in relevant part as moot*, 156 F.3d 1142 (11th Cir. 1998) (ADA violated when insurer produced no evidence that $5,000 cap on AIDS-related illnesses was grounded on actuarial data); *Doukas v. Metropolitan Life Insurance Co.*, 950 F. Supp. 422, 432 (D.N.H. 1996) (disability-based distinctions "must still be based on sound actuarial principles or related to actual or reasonably anticipated experience"); *Baker v. Hartford Life Ins. Co.*, No. 94-C-4416, 1995 U.S. Dist LEXIS 14103, at *9, *10 (N.D. Ill. Sept. 27, 1995) (denial of health coverage because of an applicant's history of seizures violates ADA if "the decision

not to insure plaintiff constituted underwriting or classifying risks").[14] These decisions are fully consistent with the long-held views of the EEOC expressed in its amicus brief in the court below, and in briefs in many other cases. *See, e.g., Bath Iron Works Corp.*, 1999 U.S. Dist. LEXIS 10600; *Chase Manhattan Bank*, 1998 U.S. Dist. LEXIS 19092; *CNA Ins. Cos.*, 96 F.3d 1039.

III. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT IDEAL FOR REVIEW

The frequency with which this issue has arisen, the vast numbers of employees whose lives are and will be affected, the thousands of employers who require guidance in complying with the law, and the plain conflict with this Court's decisions are all factors that strongly favor certiorari.[15] Moreover, particular aspects of this case make it

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[14] To be sure, many pre-*Olmstead* district courts reached conclusions consistent with the decision below. *See, e.g., Conners v. Maine Med. Ctr.*, 42 F. Supp. 2d 34, 55 (D. Me. 1999); *Jarrett v. Sprint/United Management Co.*, 37 F. Supp. 2d 1283 (D. Kan. 1999); *EEOC v. Bath Iron Works Corp.*, No. 97-355-P-H, 1999 U.S. Dist. LEXIS 10600 (D. Me. Feb. 8, 1999); *Conway v. Standard Ins. Co.*, 23 F. Supp. 2d 1199, 1201-02 (E.D. Wash. 1998); *EEOC v. Chase Manhattan Bank*, No. 97 Civ. 6620, 1998 U.S. Dist. LEXIS 19092 (S.D.N.Y. Dec. 7, 1998). For the reasons explained above, these decisions rest upon underpinnings that this Court has now expressly rejected.

[15] As many as 75% of Americans depend upon employer-provided benefit plans for health insurance. Jill L. Schultz, *The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?*, 56 WASH & LEE L. REV. 343, 351-52 & n.57 (1999). Moreover, "it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society." *Doukas*, 950 F. Supp. at 427; *Branch*, 966 F. Supp. at 1208 (same); *accord* Comment, *Insuring Americans with Disabilities: How Far Can Congress Go to*

uniquely well-suited for review. This case arises from a final judgment entered after a full trial at which respondent had free rein to present its defenses. Accordingly, the lack of an actuarial or medical basis for the distinction in benefits is not just a theoretical argument in this case, but has been squarely presented at trial and ruled on by the district court. Equally as important, the Fourth Circuit did not base its decision on a myriad of alternative grounds, but ruled solely on the single legal question presented in this petition: whether the ADA allows an employer to discriminate among categories of disabled persons in providing benefits. In the view of the Fourth Circuit, such distinctions in coverage need not be justified or even explained. But this Court's opinions and the clear statutory language require a different result.

Protect Traditional Practices?, 40 EMORY L.J. 1183, 1215-16 (1991) (recognizing that the ability of disabled individuals to become independent citizens depends on prohibition of discrimination in insurance coverage).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal or, alternatively, granting certiorari, vacating the judgment below and remanding for reconsideration in light of *Olmstead*.

Respectfully submitted.

MARY GILIBERTI
BAZELON CENTER FOR
MENTAL HEALTH LAW
1101 15th Street, N.W., #1212
Washington, D.C. 20005
(202) 467-5730

VICTOR M. GLASBERG
VICTOR M. GLASBERG
& ASSOCIATES
121 S. Columbus St.
Alexandria, VA 22314
(703) 684-1100

JERROLD J. GANZFRIED
Counsel of Record
KERRY L. ADAMS
JULIE B. GREENISEN
JOHN F. STANTON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
Harold Lewis

OCTOBER 1999

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 98-2179

HAROLD LEWIS,

Plaintiff-Appellee

v.

KMART CORPORATION,

Defendant-Appellant,

AND

AETNA INSURANCE COMPANY, AETNA LIFE INSURANCE COMPANY,

Defendants.

NATIONAL RETAIL FEDERATION; CHAMBER OF COMMERCE; EQUAL EMPLOYMENT ADVISORY COUNCIL; AMERICAN COUNCIL OF LIFE INSURANCE; THE HEALTH INSURANCE ASSOCIATION OF AMERICA; THE NATIONAL ALLIANCE FOR THE MENTALLY ILL; EMPLOYMENT LAW CENTER; AMERICAN PSYCHIATRIC ASSOCIATION; DISABILITY RIGHTS ADVOCATES; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS; NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION; WORLD INSTITUTE OF DISABILITY; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.

(CA-97-1230-A)
Argued: March 2, 1999

Decided: June 16, 1999

Before WILKINS, NIEMEYER, and HAMILTON, Circuit Judges.

Vacated and remanded by published opinion. Judge Hamilton wrote the opinion, in which Judge Wilkins and Judge Niemeyer joined.

COUNSEL

ARGUED: John Charles Fox, FENWICK & WEST, L.L.P., Palo Alto, California, for Appellant. Jeanne Goldberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellee. Jodi Beth Danis, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae EEOC. **ON BRIEF:** Victor M. Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellee, C. Gregory Stewart, General Counsel, Philip B. Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae EEOC. Robert P. Joy, Robert P. Morris, MORGAN, BROWN & JOY, L.L.P., Boston, Massachusetts, for Amicus Curiae National Retail Federation. Ann Elizabeth Reesman, Corrie L. Fischel, MCGUINESS & WILLIAMS, Washington, D.C.; Stephen A. Bokat, Robin S. Conrad, Sussan Mahallati Kysela, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C., for Amici Curiae Chamber of Commerce, et al. Phillip E. Stano, Terri Sorota, AMERICAN COUNSEL OF LIFE INSURANCE,

Washington, D.C.; Jeffrey L. Gabardi, HEALTH INSURANCE ASSOCIATION OF AMERICA, Washington, D.C.; Gregory G. Katsas, Cinton R. Pinyan, JONES, DAY, REAVIS & POGUE, Washington, D.C., for Amici Curiae ACLI, et al. Ronald S. Honberg, NATIONAL ALLIANCE FOR THE MENTALLY ILL, Arlington, Virginia; Claudia Center, THE EMPLOYMENT LAW CENTER, San Francisco, California, for Amici Curiae National Alliance, et al.

OPINION

HAMILTON, Circuit Judge:

In *Rogers v. DHEC*, 1999 U.S. App. LEXIS 6327, No. 97-2780, 1999 WL 193895 (4th Cir. April 8, 1999), we held that Title II, § 202 of the Americans With Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12132, does not require a long-term disability plan that is sponsored by a public entity to provide the same level of benefits for mental and physical disabilities. In the present appeal, this court is called upon to decide whether the same holds true under Title I, § 102(a) of the ADA, 42 U.S.C. § 12112(a), when the plan's sponsor is a private employer. We hold it does.

I.

In 1984, Kmart Corporation (Kmart) hired Harold Lewis (Lewis) as a management trainee. Over the course of the next eleven years, Lewis held various management positions at numerous Kmart stores in Pennsylvania and Virginia. Lewis had suffered from bouts of severe depression since 1979. However, by March 13, 1995, Lewis' condition had worsened such that he took a leave of absence from his position as the store manager of the Kmart store in Front Royal, Virginia.

Beginning in 1976, Kmart offered a long-term disability plan on an optional basis to its managerial employees with the full costs of the plan to be paid by the employees who elected to participate. At the time Lewis took disability leave on March 13, 1995, the long-term disability plan in place was known as the 1993 Long Term Disability Plan (the 1993 LTD Plan).[1] The 1993 LTD Plan capped disability benefits for mental disabilities at two years, but only capped disability benefits for physical disabilities upon a participant turning age sixty-five. Lewis elected to participate in the 1993 LTD Plan.

While Lewis was on disability leave, he applied for disability benefits under the 1993 LTD Plan. Lewis began receiving such benefits on September 19, 1995, but learned by the spring of 1996 that Aetna had classified his condition as mental in nature, and therefore, his disability benefits would cease on September 18, 1997.

On July 2, 1996, more than a year before the termination of his benefits, Lewis filed a charge of disability discrimination against Kmart with the Equal Employment Opportunity Commission (EEOC). The charge alleged that Lewis had been subjected to discrimination on the basis of his mental disability, because he was given less disability insurance coverage than a person with a physical disability. After receiving a right to sue letter from the EEOC, Lewis filed the present action on August 6, 1997, alleging that Kmart violated his rights under Title I, § 102(a) of the ADA

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[1] Kmart had contracted with Aetna Life Insurance Company (Aetna) to provide the insurance policy underlying the 1993 LTD Plan.

to be free from discrimination on account of his disability in the terms and conditions of his employment.[2]

Following discovery and the district court's denial of two summary judgment motions made by Kmart, the district court conducted a bench trial on April 13, 1998. On June 11, 1998, the district court entered judgment in favor of Lewis, providing him with the following relief: (1) a declaration that the two-year cap on disability benefits for employees disabled by mental illness violates Title I, § 102(a) of the ADA; and (2) a permanent injunction mandating the continued payment of monthly benefits according to the terms presented by Kmart in its post-trial memorandum regarding damages, so long as Lewis remains disabled within the meaning of the 1993 LTD Plan, and until he reaches age sixty-five. The district court also issued an accompanying memorandum opinion. See *Lewis v. Kmart,* 7 F. Supp. 2d 743 (E.D.Va. 1998).

Kmart noted a timely appeal.

II.

Title I, § 102(a) of the ADA provides:

> No [employer] shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of

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[2] Lewis also brought an ADA claim against Aetna, but the district court granted summary judgment in favor of Aetna on the ground that the statute of limitations had run on the claim. See *Lewis v. Kmart,* 993 F. Supp. 382, 387 (E.D.Va. 1998). This claim is not at issue in the present appeal.

> employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a); *see also* 42 U.S.C. § 12111(2). Title I, § 102(b) of the ADA, entitled "Construction," provides, in relevant part:

> As used in subsection (a) of this section, the term "discriminate" includes-
>
> * * *
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs) . . . .

42 U.S.C. § 12112(b)(2).

Kmart argues, *inter alia*, that the district court erred as a matter of law in ruling that the 1993 LTD Plan's provision of less long-term disability benefits for a mental disability than for a physical disability violates Title I, § 102(a) of the ADA. Thus, the issue before this court is whether Title I, § 102(a) of the ADA requires a long-term disability plan that is sponsored by a private employer to provide the same level of benefits for mental and physical disabilities. This is a question of statutory interpretation,

which we review *de novo*. See *Shafer v. Preston Mem'l Hosp.*, 107 F.3d 274, 277 (4th Cir. 1997).

In *Rogers*, we resolved this question in the context of Title II, § 202 of the ADA, which applies to public entities.[3] *See* 1999 WL 193895, at *1. In relevant part, Title II, § 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

The plaintiff-appellant in *Rogers*, Major Rogers (Rogers), was employed by the South Carolina Department of Health and Environmental Control (the State) as a maintenance engineer for twenty-two years. *See* 1999 WL 193895, at *1. The State sponsored a long-term disability plan for employees such as Rogers (the State LTD Plan), which provided one year of benefits for mental disabilities and benefits to age sixty-five for physical disabilities. *See id.* After being diagnosed with a panic-anxiety disorder, Rogers applied for long-term benefits under the State LTD Plan based on a psychological disability. *See id.*

When Rogers' long-term disability benefits ended after one year, he sued the State and the administrator of the State LTD Plan on the basis that the State LTD Plan discriminated against him in violation of Title II, § 202 of the ADA. *See id.* Of relevance in the present appeal, like Lewis, Rogers alleged that he was illegally discriminated against because he was denied the same level of long-term disability benefits as a plan participant with a physical disability. *See id.* The district court dismissed the case, pursuant to Federal

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[3] We issued our decision in *Rogers* after oral argument in the present appeal.

Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, "holding that a disparity in benefits between physical and mental disabilities in a benefit plan is not unlawful discrimination under [Title II, § 202 of] the ADA." *See id.*

On appeal, we recognized that the State satisfied the first part of Title II, § 202 of the ADA, which prohibits a qualified individual with a disability from being "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity," 42 U.S.C. § 12132, because Rogers was not excluded from participating in, nor denied the benefits of, the State LTD Plan. *See Rogers,* 1999 WL 193895, at *2. The broad question, we stated, however, was "whether the 'subjected to discrimination' phrase in [Title II, § 202] was intended to require equal benefits for mental and physical disabilities." Id. While recognizing that the plain language of the ADA does not answer this question, we emphasized that Supreme Court jurisprudence regarding a sister act of the ADA, the Rehabilitation Act, 29 U.S.C. §§ 701-796l, the ADA's "safe harbor" provision, 42 U.S.C. § 12201(c), and the related legislative history, a public policy statement of the EEOC, the applicability of another provision of the ADA, and post-ADA congressional activity gave us guidance on the issue. *See Rogers,* 1999 WL 193895, at *2. After examining each of these sources, we stated that "everything that we have considered--from pre-ADA Supreme Court cases on the Rehabilitation Act to post-ADA congressional activity--leads us to one conclusion: the ADA does not require South Carolina to provide the same level of benefits for mental and physical disabilities in its long-term disability plan for state employees." *Id.* at *4. We also recognized that our holding was consistent with recent opinions from the Third, Sixth, and Seventh Circuits. *Id.* at *1 (citing *Ford v. Schering-Plough Corp.,* 145 F.3d 601, 608 (3d Cir. 1998), *cert. denied,*

142 L. Ed. 2d 704, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) *(en banc), cert. denied*, 139 L. Ed. 2d 768, 118 S. Ct. 871 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996)).

For purposes of the issue presented in the present appeal, no material distinction exists between Title I, § 102(a) of the ADA and Title II, § 202 of the ADA. Indeed, for purposes of the issue presented in the present appeal, the only difference between these two sections is the nature of the employing entity, which is a distinction without a difference. Certainly Congress did not intend for an employer's liability for illegal discrimination under the ADA to turn on the private versus public nature of the employing entity.

Because no material distinction exists between Title I, § 102(a) of the ADA and Title II, § 202 of the ADA for purposes of the issue before us in the present appeal, our reasoning in *Rogers*, *see id.* at 1999 WL 193895, at *2-5, equally applies to resolve that issue. We, accordingly, adopt our reasoning in *Rogers* and hold that Title I, § 102(a) of the ADA does not require a long-term disability plan that is sponsored by a private employer to provide the same level of benefits for mental and physical disabilities.

Finally, we note that our holding that Title I, § 102(a) of the ADA does not require a long-term disability plan that is sponsored by a private employer to provide the same level of benefits for mental and physical disabilities is consistent with the Supreme Court decision principally relied upon by Lewis: *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996). In *O'Connor*, the defendant-employer claimed the plaintiff-employee could not establish a *prima facie* case under the

Age Discrimination in Employment Act (ADEA), *see* 29 U.S.C. §§ 621-634, because he had been replaced by someone who was also in the protected class, *i.e.*, someone over the age of forty. In rejecting that argument, the Court explained that the ADEA:

> does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.

O'Connor, 517 U.S. at 312.

According to Lewis, *O'Connor* requires us to read Title I, § 102(a) of the ADA to prohibit an employer from sponsoring a long-term disability plan that provides less benefits to one category of disabled persons than another category of disabled persons. More specifically, Lewis argues that, inasmuch as he received disability benefits for a shorter period of time because his disability was a mental disability, he "has lost out because" of his disability and, therefore, under *O'Connor*, he has a viable claim under Title I, § 102(a) of the ADA.

In addressing Lewis' argument, we initially note that the Supreme Court has never held that it is unlawful under the ADA or the Rehabilitation Act to give preferential treatment to one disability over another. In fact, in *Traynor v. Turnage*, 485 U.S. 535, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988), the Supreme Court upheld under § 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), the extension of

educational benefits to one class of disabled persons and not to others. *Id.* at 552. According to the Court, the preferential treatment of one disability over another was permissible under § 504(a) of the Rehabilitation Act because "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.* at 549. In reaching this holding, the Court emphasized that "the central purpose of § 504 . . . is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals," *id.* at 548.

We conclude *O'Connor* is of no help to Lewis. First, there is no meaningful way to distinguish *Traynor* from this case. Section 504(a) of the Rehabilitation Act provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. The sister provision of § 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), is Title I, § 102(a) of the ADA. We may presume Congress was aware of the Supreme Court's interpretation of § 504(a) of the Rehabilitation Act when it passed the ADA in 1990 and included antidiscrimination language in Title I, § 102(a) that parallels § 504(a) of the Rehabilitation Act. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979).

Cf. Rogers, 1999 WL 193895, *3 ("We may presume that Congress was aware of the Supreme Court's interpretation of § 504 of the Rehabilitation Act when it (Congress) passed the ADA in 1990 and included antidiscrimination language in § 12132 that parallels § 504 of the Rehabilitation Act.").

Second, reliance on *O'Connor* simply does not make intuitive sense. As recognized in *Traynor*, our federal disability statutes ensure that disabled persons are treated evenly in relation to nondisabled persons. *See* 485 U.S. at 548. Thus, our federal disability statutes are not designed to ensure that persons with one type of disability are treated the same as persons with another type of disability. In contrast, the ADEA, which was at issue in *O'Connor*, ensures that all persons over the age of forty are treated evenly on account of their age in relation to all other persons, not just those persons under the age of forty. Therefore, the ADA and the Rehabilitation Act permit preferential treatment between disabilities, but the ADEA does not permit preferential treatment to any person at the expense of any other person over the age of forty on account of age.[4]

III.

In conclusion, we hold that Title I, § 102(a) of the ADA does not require a long-term disability plan that is

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[4] Kmart alleges the district court committed several other errors alternatively entitling it to relief. Given the dispositive nature of our holding with respect to Kmart's appeal, we need not and do not address these other alleged errors.

sponsored by a private employer to provide the same level of benefits for mental and physical disabilities. Accordingly, we vacate the district court's memorandum opinion filed on June 11, 1998, its final judgment in favor of Lewis, and remand with instructions to enter judgment in favor of Kmart.

VACATED AND REMANDED

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. CIV. A. 97-1230-A
HAROLD LEWIS,
Plaintiff

v.

AETNA LIFE INSURANCE COMPANY,

AND

KMART CORPORATION
Defendants

Oct. 24, 1997

COUNSEL

Phyllis E. Andes, John C. Fox, Craig A. Selness, Fenwick & West, LLP, Washington, DC, for Kmart.

Ronald S. Cooper, Tracy Zorpette, Brian A. Davis, Steptoe & Johnson, LLP, Washington, DC, for Aetna.

MEMORANDUM OPINION

Before the Court are the defendants' Motions to Dismiss, and plaintiff's Motion for Preliminary Injunction, in a case of first impression in the Fourth Circuit.

I. FACTUAL BACKGROUND

Plaintiff, Harold Lewis, is a 43 year-old Virginia resident who has suffered from severe depression since 1979.[1] After the onset of his condition, plaintiff sought and received treatment, and was able to function normally. In 1984, plaintiff obtained employment with defendant Kmart Corporation, through which he was offered and enrolled in a disability insurance plan provided by defendant Aetna. Lewis claims, and defendants do not dispute, that he paid all necessary premiums and fulfilled all other plan obligations.

In 1995, Lewis' conditioned worsened, and by March of that year he took leave from his position as Store Manager. Lewis was unable to return to work and began receiving disability benefits under the Aetna plan on September 19, 1995. Under the plan, disability payments are made to qualified recipients until they reach age sixty-five; however, the plan provides that:

> After the first twenty-four months of the period of total disability, such period shall be deemed to terminate as of any date on which the total disability

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[1] Plaintiff has submitted expert evidence to show that his condition is the result of a medically determinable biological impairment resulting from an "imbalance of certain chemicals in his brain" and "other organic problems," a condition he describes as "organic depression." However, plaintiff does not argue that his disability is physical rather than mental in nature.

> is caused by any condition other than a medically determinable physical impairment.... The term "medically determinable physical impairment" shall mean a physical impairment which results from anatomical or physiological abnormalities which are exclusively organic and non-psychiatric in nature and which are demonstrated by medically acceptable clinical and laboratory techniques.

Complaint at ¶ 12 (emphasis added). Aetna informed plaintiff that his condition had been classified as not "exclusively organic and non-psychiatric in nature" and that plaintiff's benefits under the plan would therefore terminate as of September 19, 1997. Plaintiff subsequently brought the present action, claiming that defendants had discriminated against him on the basis of his disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"). Specifically, Lewis alleges that Kmart violated his right to terms and conditions of employment free from discrimination based on his disability, and that Aetna violated his right to public accommodation free from discrimination based on his disability under 42 U.S.C. §§ 12112 and 12102, respectively.[2] Plaintiff seeks to enjoin defendants from terminating his disability benefits under the plan, in addition to declaratory and other relief.[3]

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[2] Plaintiff also initially asserted breach of contract and promissory estoppel claims against both defendants based on his disability benefit insurance contract with Aetna. These claims appear to be preempted by ERISA, and plaintiff has agreed to the dismissal of these claims.

[3] Specifically, plaintiff seeks:

1. A preliminary injunction barring defendants from terminating his disability benefits pending an adjudication of his claims;

2. A declaration that defendants have violated his rights under the ADA;

In the motions presently before the Court, defendants seek to dismiss plaintiff's claims under Fed. R. Civ. P. 12(b)(6), and plaintiff seeks a preliminary injunction barring defendants from terminating his disability benefits pending an adjudication of his claims.

II. DISCUSSION

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is properly granted "where, assuming the facts in the complaint are true, it is clear as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Miller v. Pulaski Sheriff's Dept.*, 30 F.3d 130 (4th Cir. 1994). Here, assuming as true that plaintiff's insurance policy discriminates between mental and physical disabilities and the alleged facts concerning the nature of plaintiff's disability, defendants set forth three arguments for dismissal. First, plaintiff cannot bring a claim against Kmart pursuant to ADA Title I because he is not a "qualified individual with a disability." Second, plaintiff cannot bring a claim against Aetna pursuant to ADA Title III because his employee benefits plan is not a good or service purchased in a place of public accommodation within the meaning of Title III. Finally, employee benefit plan distinctions between physical and mental disabilities do not violate either Title I or Title III of the ADA.

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3. A permanent injunction barring defendants from terminating his benefits under the insurance policy on the basis of the mental/physical distinction described above; and

4. An award of costs and attorney's fees.

distinctions between physical and mental disabilities do not violate either Title I or Title III of the ADA.

A. Title I Standing: Plaintiff's Ability to Sue as a "Qualified Individual with a Disability"

Under the ADA, an employer may not discriminate against a "qualified individual with a disability" on the basis of that disability in the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The "terms, conditions, and privileges of employment" include "[f]ringe benefits available by virtue of employment, whether or not administered by the [employer]." 29 C.F.R. § 1630.4(f). Plaintiff contends that, under a plain meaning interpretation of the above language, disability benefits provided to employees qualify as both a "privilege of employment" and a "fringe benefit available by virtue of employment" within the meaning of 42 U.S.C. § 12112(a). Consequently, plaintiff argues, disability benefits provided by an employer are subject to the protections of ADA Title I. In support, plaintiff cites *Schroeder v. Connecticut General Life Ins. Co.*, No. 93-M-2433, 1994 WL 909636, at *1 (D. Colo. Apr. 22, 1994). In *Schroeder*, plaintiff alleged that a disability benefits plan made available to him through his employer violated the ADA because it provided inferior coverage for mental as opposed to physical disability. *Id.* at *3. The court, examining the language of § 12112, reasoned that the benefit plan at issue was a term and condition of plaintiff's employment, and that plaintiff's employer was therefore prohibited from offering discriminatory plans to its employees. *Id.* In particular, the court noted that section 12112(b)(2) expressly prohibits an employer from "participating in a contractual or other arrangement ... [with] an organization providing fringe benefits to an employee" that has the effect of subjecting that employee to discrimination on the basis of disability. On the basis of this provision, the court concluded that plaintiff's employer was

subject to the prohibitions of Title I even though the plan was actually issued by a third party insurer. *Id.* This interpretation appears to be consistent with the views of the EEOC, which has advocated the application of ADA Title I protection to employer-provided disability benefits. *See EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1043 (7th Cir. 1996) (EEOC seeks to enjoin former employer from terminating long term disability benefits for a person disabled by mental illness while not imposing similar limits on those with physical disabilities); *Leonard F. v. Israel Discount Bank of New York,* No. 95 Civ. 6964 (CLB), 1996 WL 634860, at *3 (S.D.N.Y. Sept. 24, 1996) (EEOC advocates application of Title I protection for bank employee suing bank regarding disability plan which provided inferior benefits for mental as opposed to physical disability) *subsequent proceedings*, 967 F. Supp. 802 (S.D.N.Y. 1997).

The Aetna disability plan at issue here was offered to Kmart employees as a benefit made available by virtue of their employment with Kmart. Consequently, under the plain meaning interpretation of 42 U.S.C. § 12112(a) and 29 C.F.R. § 1630.4(f) adopted in *Schroeder*, the Aetna plan qualifies as both a "privilege of employment" and as a "fringe benefit available by virtue of employment" within the meaning of 42 U.S.C. § 12112(a). Accordingly, the ADA prohibits Kmart from offering a "qualified individual with a disability" disability benefits that discriminate on the basis of that disability. This is true whether Kmart provides the disability benefits itself, or offers benefits issued by a third party insurer such as Aetna. *See* 42 U.S.C. § 12112(b)(2).

The question remains, however, as to whether Lewis is a "qualified individual with a disability." The Fourth Circuit has held that, in order to obtain relief under the protections of ADA Title I, an employee must demonstrate that he is a "qualified individual with a disability" within the meaning of the statute. *See* 42 U.S.C. § 12112(a); *Martinson*

v. Kinney Shoe Corp., 104 F.3d 683 (4th Cir. 1997); *Carrozza v. Howard County*, No. 94-1593, 1995 WL 8033, at *1 (4th Cir. Jan. 10, 1995). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [the] individual holds or desires." 42 U.S.C. § 12111(8). Thus, in *Martinson*, plaintiff, a shoe store clerk who was unable to perform essential security functions because of episodic bouts of epilepsy, could not maintain suit as a "qualified individual with a disability" pursuant to ADA Title I. *Martinson*, 104 F.3d at 683-87. Similarly, in *Carozza*, plaintiff, a typist unable to use word processing software and to perform other essential office functions because she suffered from bipolar disorder, was not a "qualified individual with a disability" for purposes of ADA Title I. *Carozza*, 1995 WL 8033 at **1-2. In light of these cases, defendant Kmart contends that, because plaintiff is totally unable to perform work functions, plaintiff cannot be a "qualified individual with a disability." Consequently, defendant argues, plaintiff lacks standing to sue for violation of ADA Title I.

In support of this construction of Title I, defendant cites *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321 (W.D. Tenn. 1995), *aff'd in part and rev'd in part*, 99 F.3d 181 (6th Cir. 1996), *reh'g en banc granted, judgment vacated*, 107 F.3d 359 (6th Cir. 1997), *reh'g en banc*, 121 F.3d 1006, 1997 WL 431851 (6th Cir. 1997), and *CNA*, 96 F.3d at 1039. In both cases, plaintiff-employees obtained long term disability insurance plans issued by a third party insurer through their employers. *Parker*, 875 F. Supp. at 1323; CNA, 96 F.3d at 1041. As in the present case, the plaintiffs purchased plans that provided benefits for physical disabilities through age sixty-five, but limited benefits for mental disabilities to twenty-four months. *Parker*, 875 F. Supp. at 1323; *CNA*, 96 F.3d at 1041. During the course of

their employment, both plaintiffs became completely unable to perform work functions due to mental disabilities, and began receiving disability benefits under their respective plans. *Parker,* 875 F. Supp. at 1323; *CNA,* 96 F.3d at 1041. When their benefits threatened to run out, both plaintiffs brought suit against their employers under Title I of the ADA. *Parker,* 875 F. Supp. at 1323; *CNA*, 96 F.3d at 1041. Construing Title I, both the *Parker* and *CNA* court held that plaintiffs could not maintain suits against their employers pursuant to Title I because neither plaintiff could demonstrate herself to be a "qualified individual with a disability." *See Parker*, 875 F. Supp. at 1325-26, *CNA,* 96 F.3d at 1043-45. The Sixth Circuit explained that "Ms. Parker was at no time a 'qualified individual with a disability.' At the time she could 'perform the essential functions' of her job, she was not disabled for purposes of her long term disability claim, and therefore was not covered by the Disabilities Act, and at the time her insurance benefits were terminated, she could no longer perform her job." *Parker*, 99 F.3d at 186. Defendant argues that Mr. Lewis is similarly barred from asserting Title I claims in the present action.

In response, plaintiff argues that a rational interpretation of Title I in the context of disability benefits requires an expansive interpretation of § 12112(a). In particular, plaintiff contends that Lewis' employment with Kmart and acceptance of disability benefits during the course of that relationship are factors that "qualify" him to bring suit pursuant to Title I. As plaintiff points out, this approach is consistent with the interpretation urged by the EEOC, which has asserted that:

> the relevant 'employment position' in any case involving post-employment fringe benefits, is the position actually occupied by plaintiff, that of benefit recipient, and that as long as the plaintiff satisfies any nondiscriminatory

> eligibility criteria for receipt of benefits, he is a 'qualified individual' within the meaning of the ADA.

Leonard, 1996 WL 634860 at *3.

With all due respect to the Sixth and Seventh Circuits, this Court declines to follow the narrow view of the ADA proffered by defendants, and concurs with the plaintiff's more expansive view. The Fourth Circuit precendent reflected in *Martin* and *Carozza* does not conflict with this approach because Lewis was a "qualified individual with a disability" at the time of the alleged discrimination. As plaintiff alleges, he has suffered from severe, organically based depression since 1979. Nevertheless, Lewis was able to control his symptoms through the use of medication well enough to perform his duties as a Kmart employee and earn him several promotions over the course of his employment. As such, plaintiff clearly qualifies as an individual with a disability who was, nonetheless, able to perform the "essential functions" associated with his employment. Plaintiff must therefore be considered a "qualified individual with a disability" during the scope of his employment with Kmart. *See* 42 U.S.C. § 12112(a); 42 U.S.C. § 12111(8). Furthermore, to the extent that plaintiff has suffered discrimination within the purview of the ADA, it occurred when he was offered a disability benefits plan that provided inferior coverage for disabilities that were mental rather than exclusively physical in nature. This plan was offered to plaintiff while he worked for Kmart. Thus, plaintiff was a "qualified individual with a disability" at the time of the alleged discrimination, even though his actual injury did not occur until his benefits stopped. Plaintiff's right to maintain a claim for discrimination pursuant to ADA Title I therefore vested at that time, and continues although plaintiff is now no longer able to perform his duties as an employee.

This interpretation of 42 U.S.C. § 12112(a) accords both with the language of and the policies behind the ADA. Conversely, the interpretation urged by defendant, that Lewis cannot maintain suit as a "qualified individual" because he was totally disabled at the time he actually began collecting disability benefits under the Aetna plan, yields an irrational result. Under this interpretation, Lewis would lack standing to sue under Title I until he had claimed benefits under the disability policy. In order to obtain benefits, however, Lewis would be required to show that he was totally disabled and unable to perform the functions required by his position. By doing so, Lewis would render himself unable to maintain suit as a "qualified individual with a disability" pursuant to Title I. Such an interpretation would effectively prevent any plaintiff from challenging an employer's provision of disability benefits as discriminatory under Title I of the ADA. So enormous a gap in the protection afforded by Title I would be clearly at odds with the expressed purpose of the ADA to "address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. § 12101(b), and "to bring individuals with disabilities into the economic and social mainstream of American life ... in a clear, balanced, and reasonable manner." H.R. Rep. No. 485, 101st Cong. pt. 2, at 99 (1990).

The *Parker* and *CNA* courts were not faced with a plaintiff who claimed to be a "qualified employee with a disability" at the time an allegedly discriminatory plan was offered to him. *See Parker,* 99 F.3d at 185; *CNA*, 96 F.3d at 1044-45. Unlike Lewis, the plaintiffs in both cases appear to have become disabled after they were offered the plans alleged to be discriminatory.[4] Consequently, this Court must

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[4] Specifically, the *CNA* court considered plaintiff's claim that a person who had not been a "qualified individual with a disability" during the course of her employment could nevertheless maintain a Title I claim against her employer on the grounds that the offered plan discriminated against able-bodied employees who would in the future become disabled

be cautious in applying the Title I findings of Parker and *CNA* to the instant case. Both *CNA* and *Parker* might be read to stand for the proposition that an individual who was a "qualified individual with a disability" and subject to discrimination during the course of his employment may no longer maintain a Title I claim after he has become totally disabled and begun receiving disability benefits. To the extent that these cases so hold, this Court declines to follow their interpretation for the reasons given above. Accordingly, this Court concludes that Lewis was a "qualified individual with a disability" at the time that the allegedly discriminatory plan was offered to him, and is therefore entitled to sue under ADA Title I to redress the effects of that discrimination. Having reached this conclusion, this Court must next determine whether plaintiff may maintain his discrimination claims against Aetna pursuant to ADA Title III.

B. Title III Standing: The Aetna Plan as a Good or Service Provided by a Place of Public Accommodation

Title III of the ADA provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Under 42 U.S.C. § 12181(F), the definition of a "public accommodation" includes an "insurance office." Federal regulations construing Title III define a "place of public accommodation" as a "facility," and define a facility as, inter alia, "buildings, structures, sites ... ." 28 C.F.R. § 36.104.

Defendant Aetna contends that the protections of § 12182 do not extend to the contents of insurance policies,

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due to mental rather than physical conditions. *CNA*, 96 F.3d at 1044. We need not, and do not, consider such a claim.

and that, even if they do, those protections do not apply in the instant case because Lewis did not physically purchase his Aetna policy from an "insurance office" or other "place of public accommodation." *See* 42 U.S.C. § 12181(F), 28 C.F.R. § 36.104.

Plaintiff opposes this restrictive reading of Title III, relying in part on the Department of Justice position that "insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts that they offer." Dep't of Justice, Americans with Disabilities Act Technical Assistance Manual, § III-3.11000. Similarly, several federal courts considering the reach of Title III have concluded that it reaches the sale of insurance policies, and have allowed Title III actions against insurers on this basis. *See Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England,* 37 F.3d 12, 20 (1st Cir. 1994); *World Ins. Co. v. Branch,* 966 F. Supp. 1203, 1207 (N.D. Ga. 1997); *Cloutier v. Prudential Ins. Co. of Am.,* 964 F. Supp. 299, 301 (N.D. Cal. 1996); *Kotev v. First Colony Life Ins. Co.,* 927 F. Supp. 1316, 1321-22 (C.D. Cal. 1996); *Baker v. Hartford Life Ins. Co.,* No. 94C 4416, 1995 WL 573430, *3 (N.D. Ill. Sept. 28, 1995).

In response, defendant *contends* that, even if the protections of Title III extend to insurance policies provided by an "insurance office," plaintiff did not seek the goods or services of such a public accommodation here because he did not physically enter an insurance office to purchase his Aetna policy. *See Parker v. Metropolitan Life Ins. Co.,* 121 F.3d 1006, 1007 (6th Cir. 1997) (en banc); discussion of Parker *supra.* Parker brought claims essentially identical to those at issue here. Narrowly construing the language of Title III, a majority of the Sixth Circuit reasoned that goods and services offered by a "place of public accommodation" referred only

to goods and services purchased on the physical premises of a covered business.[5] *Id.* at 1010. The court therefore concluded that plaintiff lacked Title III standing because she did not physically enter the insurer's place of business to purchase her policy.[6] *Id.* The court explained that:

> While we agree that an insurance office is a public accommodation as expressly set forth in § 12181(7), plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation. As is evident by § 12187(7), a public accommodation is a physical place and this Court has previously so held.

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5 In a strong dissent, Judge Merrit argued that the narrow interpretation adopted by the en banc panel leads to an irrational result: "It boggles the mind to think that Congress would include only the few people who walk into an insurance office to buy health insurance but not the millions who get such insurance at work. This distinction drawn by the Court produces an absurd result." See *Parker,* 121 F.3d 1006, 1021 (Merrit, J., dissenting). Judge Merrit further noted that so-called "safe harbor" provisions applicable specifically to the insurance industry would be superfluous if the ADA did not contemplate the ability of the insureds to sue their insurer under Title III.

6 Similarly, both the Southern District of Ohio and the Northern District of California have reached the conclusion that some nexus to an actual physical place where goods and services are sold is required in order to find discrimination under Title III. *See Martin Schaaf v. Association of Educational Therapists,* No. C94-03315 CW, 1995 WL 381979 (N.D. Cal. June 13, 1995); *Pappas v. Bethesda Hosp. Ass'n,* 861 F. Supp. 616 (S.D. Ohio 1994). We decline to adopt this interpretation of Title III, for the reasons set forth infra.

Id. (citations omitted). Citing this ruling, defendant argues that Lewis, like Parker, may not assert a claim against Aetna under Title III because he did not physically enter the offices of Aetna to purchase his policy and consequently did not purchase a good or service from a place of public accommodation within the meaning of ADA Title III.

In response, plaintiff points out that nothing in the language of § 12182(a) requires that a good or service offered by a place of public accommodation be purchased on the physical premises of that office in order for the protections of Title III to apply. *See* 42 U.S.C. § 12182(a), 12181(7)(F). In accordance with plaintiff's position, several courts interpreting Title III have concluded that its protections extend to goods not purchased in a physical office. For example, the First Circuit concluded in *Carparts* that "[t]he plain meaning of [§ 12182(a) and 12181(7)(F)] do not require 'public accommodations' to have physical structures for persons to enter," and that "[n]either Title III nor its implementing regulations make any mention of physical entry." 37 F.3d at 19. On this basis the First Circuit concluded that plaintiff could maintain his Title III claims against his insurer even though he had not actually entered a physical office in order to purchase his policy. *Id.* at 18-21; *accord Branch*, 966 F. Supp. at 1203; *Kotev,* 927 F. Supp. at 1322; *Baker,* 1995 WL 573430 at *1.

Furthermore, as the First Circuit and other courts have concluded, ignoring the language of Title III and adopting the construction urged by defendant yields an irrational result. *See Carparts,* 37 F.3d at 13; *Branch*, 966 F. Supp. at 1203; *Kotev,* 927 F. Supp. at 1322; *Baker,* 1995 WL 573430 at *1. Under the interpretation urged by defendant, a place of public accommodation would be barred by Title III from discriminating in the provision of goods and services sold on its physical premises, but the same establishment would be free to discriminate in the provision of goods and

services purchased by mail order or by telephone. Thus, a department store which could not refuse to sell shoes to disabled customers who visited the store's downtown business location could freely refuse services to disabled customers who ordered from the store's catalog. It is difficult to believe that Congress intended to withhold the protections of the ADA from the millions of disabled persons who buy their goods by telephone, mail-order, or home delivery without ever entering the physical premises of a business establishment. It is even more difficult to believe that Congress intended this result to apply to the insurance industry, whose goods and services (insurance policies) are routinely purchased by customers who never set foot in an insurance office, as is the case here.[7] Indeed, under defendants' construction, an insurer could freely discriminate in the provision of insurance without fear of ADA Title III simply by not maintaining a physical office or by marketing its policies via the U.S. mail. This would directly conflict with Congress' purpose in enacting the ADA to "provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b).

Defendant also points out that Lewis did not purchase his policy directly from Aetna, but instead obtained the policy through his employer. This distinction is unavailing in light of the language of Title III. *See* 42 U.S.C. § 12182(b)(1)(A)(I). Specifically, § 12182(b)(1)(A)(I) provides that:

> [i]t shall be discriminatory to subject an individual or class of individuals on the basis

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[7] On this point, *see Parker,* 121 F.3d 1006, 1021 (Merrit, J., dissenting).

> of a disability or disabilities of such individual or class, **directly, or through contractual licensing, or other arrangements**, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

Id. (emphasis added). Thus, an insurer may not discriminate in the provision of insurance regardless of whether the policy is sold directly to a disabled individual or made available to that individual indirectly via an employer pursuant to a contractual or other relationship.

For the reasons set forth above, this Court concludes that Title III prohibits an insurer from discriminating on the basis of disability in the insurance policies that it offers, whether these policies are purchased at the office of the insurer or otherwise, and whether they are purchased directly by an insured or made available to him by his employer.

C. Physical/Mental Distinctions in Employee Benefit Plans as Discrimination in Violation of the ADA

Having determined that plaintiff has standing to sue defendant Kmart pursuant to Title I, and defendant Aetna pursuant to Title III of the ADA, the Court must determine whether the distinction between benefits for mental versus physical disabilities constitutes discrimination on the basis of disability in violation of the ADA.

As defendants point out, in insurance matters, the protections of ADA Titles I-III are limited by a so-called "safe harbor" provision set forth in Title IV at 42 U.S.C. § 12201(c). This section provides at paragraph (1) that: "subchapters I through III of this chapter and title IV of this

Act shall not be construed to prohibit or restrict . . . an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." *Id.* However, § 12201(c) also provides that "[p]aragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter." *Id.* The meaning of the § 12201(c)(1) "safe harbor" provision is not clear on its face and therefore, as other courts have pointed out, merits a consideration of the legislative history behind it. Construing § 12201(c), the House has explained that:

> Under the [ADA], a person with a disability cannot be denied insurance or be subject to different terms and conditions of insurance based on disability alone, if the disability does not impose increased risks . . . Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or limit the amount, extent, or kind of coverage available . . . solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

H.R. Rep. No.45, 101st Cong. pt. 2, at 136-37 (1990). The same report goes on to explain that:

> Specifically, [section § 12201(c)] makes it clear that insurers may continue to sell and to underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such products, so long as the standards used are

> based on sound actuarial data and not on speculation . . . In sum, [the ADA] requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.

H.R. Rep. No. 45, 101st Cong. pt. 3, at 70 (1990). Senate legislative history concerning § 12201(c) and Department of Justice guidelines for implementing § 12201(c) use essentially similar language. *See* S. Rep. No. 116, 101st Cong., 4-6 (1990); Dep't of Justice, Americans with Disabilities Act Technical Assistance Manual, § III-3.11000.

As plaintiff points out, several courts have interpreted the language of § 12201(c) and the legislative history associated with it to mean that insurance practices which treat disabled individuals differently based on their disability are protected only to the extent that they are supported by actuarial data or the actual experience of the insurer regarding the risk at issue. In *Doukas*, 950 F. Supp. at 432, the court held that, in denying plaintiff coverage on the basis of her bipolar disorder, defendant insurer was required not only to conform its actions to the requirements of state law, but that, under the ADA "[its] methods must still be based on sound actuarial principles or related to actual or reasonably anticipated experience." Because neither party had introduced sufficient evidence as to the potential actuarial basis for the defendant's decision to deny coverage, the court denied either party judgment as a matter of law. *Id.* In *Branch,* 966 F. Supp. at 1208, the court extended this principle to plan distinctions that target particular disabilities, in particular a $5,000 cap on coverage for AIDS related expenses where coverage for other illnesses extended to $2,000,000, concluding that "the principle . . . appears to be that insurance practices are protected to the extent that they are in accord with sound actuarial principles, reasonably

anticipated experience, or bona fide risk classification." *Id.* Because the insurer had utterly failed to present actuarial evidence to explain the differential treatment, the court granted the insured's counterclaim under ADA Title III. *Id.* In *Baker,* 1995 WL 573430 at *4, the court concluded that defendant insurer's denial of coverage to a plaintiff subject to seizures would be permitted under § 12201(c) "if the decision not to insure plaintiff constituted underwriting or classifying risks," but that a plaintiff subject to discrimination on the basis of a disability may be entitled to recovery under the ADA if the decision "was not based on considerations of underwriting or classifying risks." *Id.* In light of these cases, plaintiff contends that the distinction in coverage between mental and physical abilities at issue may be upheld only if it is based on actuarial principles or other competent factual basis.

In response, defendants contend that, while the ADA clearly prohibits discrimination on the basis of a mental disability, no such discrimination has taken place in the present case. Specifically, defendants note that plaintiff has not been denied coverage on the basis of his mental disability, or been offered benefits different from those available to others because of it. Instead, plaintiff was offered the same disability benefits plan made available to all other Kmart employees, both disabled and able-bodied. In support of their position, defendants cite *Parker*, *CNA*, and *Krauel v. Iowa Methodist Medical Center.*[8] *See Parker,* 121 F.3d at

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[8] Defendants also cite two cases construing the Rehabilitation Act, a close relative of the ADA, for the proposition that distinctions like those at issue here do not constitute unlawful discrimination. *See Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985); *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988). As the original *Parker* appellate court pointed out, these cases are inapposite. *See Parker*, 99 F.3d at 190 n.4. *Alexander* dealt with general limitations on the availability of Medicare benefits, such as a limit on inpatient hospital days, which applied equally to all recipients. *Traynor*

1015; *CNA*, 96 F.3d at 1044; *Krauel*, 95 F.3d 674, 678 (8th Cir. 1996). Although all three cases were decided on so-called "standing" issues under Titles I and III, and were therefore not required to determine whether distinctions like the one at issue here violate the ADA, their reasoning needs to be addressed. As the *Parker* court, considering a mental/physical distinction in benefits treatment essentially similar to the one at issue here, explained:

> The disparity in benefits provided in the policy at issue is [] not prohibited by the ADA because the ADA does not mandate equality between the disabled and the non- disabled; specifically, the ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied.

Parker, 121 F.3d at 1015.

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held that it was lawful under the Rehabilitation Act to deny benefits to veterans if their disability was the result of their own intentional conduct. Neither case dealt with the explicit discrimination against a particular category of disability alleged here. Consequently, defendants' reliance on *Modderno v. King* is also misplaced. 82 F.3d 1059 (D.C. Cir. 1996). In *Modderno*, the First Circuit concluded that the facially neutral limitations approved in Traynor and Alexander justified inferior benefits for mental health conditions in a plan covered by the Rehabilitation Act. *Id.* at 1060. This is not a reasonable extension of the holdings in those cases. Furthermore, even if such distinctions are valid under the Rehabilitation Act, the ADA was enacted because "current laws [e.g. the Rehabilitation Act] were 'inadequate' to combat 'the pervasive problems of discrimination that people with disabilities are facing.'" *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (quoting S. Rep. No. 116, 101st Cong., 1 (1989)).

Similarly, in *CNA*, the Seventh Circuit noted that "all employees--the perfectly healthy, the physically disabled, and the mentally disabled--had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous." *CNA*, 96 F.3d at 1044. The court concluded that "this may or may not be the enlightened way to do things, but it was not discriminatory in the usual sense of the term." *Id.* (citations omitted).

Lastly, in *Krauel*, the Eighth Circuit noted that an insurance plan that excluded coverage for infertility problems could not constitute disability based discrimination in violation of the ADA because the challenged exclusion "does not single out a particular group of disabilities, . . . rather, the Plan's infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for the treatment of infertility problems." *Krauel*, 95 F.3d at 674.

On the basis of these cases, defendants argue that the distinction between mental and physical benefits at issue here merely constitutes discrimination between disabilities rather than discrimination between the disabled and the non-disabled, and as such does not constitute unlawful discrimination in violation of the ADA. Defendants correctly note that the majority of benefit cases cited by plaintiff deal with the denial of coverage on the basis of a particular disability, and that no such denial has taken place here. *See, e.g., Cloutier*, 964 F. Supp. at 299 (claim based on denial of coverage); *Kotev*, 927 F. Supp. at 1316 (same); *Doukas*, 950 F. Supp. at 432 (same); *Baker*, 1995 WL 573430, at *1 (same).

The *Branch* court declined to adopt this line of reasoning, finding that the broad antidiscrimination principles of the ADA extended to plan distinctions which target a particular disability. *See* 966 F. Supp. at 1206-09.

The court examined the actuarial justification requirements associated with § 12201(c) and the expressed purpose of the ADA to integrate the disabled into American social and economic life, and reasoned that: "Because access to health care is often integral to a disabled person's ability to participate in society, the court cannot imagine that an insurer could arbitrarily cap the benefits payable with respect to a particular disability without running afoul of this stated purpose." *Id.* at 1208. The court therefore held that plan distinctions that target a particular disability such as AIDS for inferior coverage require some actuarial justification in order to be valid under the ADA. *See Branch*, 966 F. Supp. at 1207. Applying this standard, the court granted summary judgment on the insured's Title III claims after finding "a complete absence of evidence demonstrating that plaintiff's decision to cap its coverage of AIDS was based on sound actuarial principles." *Id.* at 1209.

The *Branch* court's interpretation of the scope of the ADA is consistent with that of the EEOC, which has brought suit and filed amici briefs arguing that arbitrary distinctions between mental and physical disabilities in disability benefit plans constitute discrimination in violation of the ADA. *See, e.g., CNA*, 96 F.3d at 1039 (EEOC argues that inferior coverage for mental disabilities in disability benefits plan violates ADA); *EEOC v. Avamark Corp. et al.*, Civ. No. 97-734 (RMV) (D.D.C. 1997) (same); *EEOC v. Chase Manhattan Bank et al.*, Civ. No. 97-6620 (S.D.N.Y. filed Sept. 9, 1997) (same).[9]

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[9] Defendants note that the EEOC has in the past stated that distinctions between mental and physical illness in *health insurance* do not violate the ADA. *See* EEOC Interim Guidance on Application of ADA to Health Insurance, June 3, 1993. To the extent that this was ever the position of the EEOC with regard to disability benefit plans, it does not appear to be so now.

After examining the arguments presented by both sides, this Court finds that the distinction drawn by defendants is illusory. Both a decision to deny coverage on the basis of mental disability and to provide inferior coverage for mental disabilities target the mentally disabled for inferior treatment. In both cases, an insurer has subjected the mentally disabled individual to treatment inferior to that accorded to others solely on the basis of that individual's disability. As discussed above, the ADA clearly prohibits discrimination on the basis of disability absent some actuarial justification. Defendants' attempt to categorize such discrimination as discrimination between categories of disability rather than discrimination between the disabled and the non-disabled fails here. Under defendants' logic, an employer could hire an employee with a physical disability over a more qualified employee with a mental disability solely because of the mental disability, without violating the ADA, simply because both applicants were members of the protected class.

Defendants' interpretation flies in the face of the language of the ADA, which prohibits discrimination against an "individual with a disability because of the disability of such individual." *See* 42 USC § 12112(a). That is, the ADA prohibits discrimination on the basis of an individual's particular disability. Thus, whether a disabled person is treated differently than a non-disabled person or another disabled person, the same wrong has occurred. That is, the person has been discriminated against because of his particular disability. The Supreme Court recently affirmed this exact principle within the context of age discrimination, a type of claim that often accompanies claims of disability under the ADA. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 134 L. Ed. 2d 433, 116 S. Ct.

1307 (1996). As the Court explained: "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." *Id.* Furthermore, the Court held that discrimination on the basis of age meant discrimination based on the condition of a particular individual, and not on that individual's membership in the protected class (those over 40 years of age). *Id.* at 130. Thus, the ADEA "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination because of their age, but limits the protected class to those who are 40 years or older." *Id.*

Similarly, the ADA must be construed to prohibit discrimination against individuals based on their specific disability, and not merely to prohibit discrimination that negatively affects the disabled as a class.

It would be incorrect, therefore, to find that, as defendants have argued, the ADA prohibits only discrimination between the disabled and the non-disabled, because the Court concludes that the ADA prohibits discrimination on the basis of an individual's particular disability. Only by doing so can the ADA achieve Congress' goal to "bring individuals with disabilities into the economic and social mainstream of American life." H.R. Rep. No. 45, 101st Cong. pt.2, at 99 (1990). Consequently, an insurer may not provide different levels of coverage for mental as opposed to physical disabilities unless such classification is grounded on sound actuarial principles or other competent factual basis.[10]

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[10] A plan distinction that has some actuarial basis may still run afoul of the ADA as a "subterfuge" under the language of 42 U.S.C. § 12201(c). *See Branch*, 966 F. Supp. at 1208 n.6; *Doukas*, 950 F. Supp. at 432; *Baker*, 1995 WL 573430 at *4. Both parties have proffered extensive arguments concerning the meaning of the "subterfuge" provision. Because this Court finds that the legislative history of § 12201(c) clearly

For the reasons set forth above, this Court concludes that plaintiff has plead the requirements necessary to assert a claim against defendants Kmart and Aetna pursuant to Titles I and III of the ADA respectively. Furthermore, based on the language of the ADA and its express legislative history, the Aetna plan's distinction between physical and mental disabilities may survive scrutiny under the ADA only if it is based on actuarial principles or other competent factual information. Because no actuarial or other factual evidence concerning the distinctions at issue has been presented to this Court, plaintiff's claims must go forward. Therefore, defendants' respective motions to dismiss will be denied by an appropriate order.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

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requires some actuarial justification for plan distinctions like the one at issue here, and because it cannot yet be determined whether such a justification exists, this Court need not and does not determine the exact meaning and effect of the "subterfuge" provision at this time.

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. Civ. A. 97-1230-A
HAROLD LEWIS

Plaintiff

v.

AETNA LIFE INSURANCE COMPANY,

AND

KMART CORPORATION

Defendants

United States District Court, E.D. Virginia
Alexandria Division.

June 11, 1998

COUNSEL

Victor M. Glasberg, Jeanne Goldberg, Victor M. Glasberg & Associates, Alexandria, VA, for Plaintiff.

Phyllis E. Andes, John C. Fox, Craig A. Selness, Fenwick & West, LLP, Washington, DC, for Kmart.

Ronald S. Cooper, Tracy Zorpette, Brian A. Davis, Steptoe & Johnson, LLP, Washington, DC, for Aenta.

MEMORANDUM OPINION

BRINKEMA, District Judge.

I.

The facts of this case have been stated in detail in previous opinions but are summarized briefly here for reasons of clarity. Plaintiff Harold Lewis has suffered from severe depression since 1979, but obtained treatment for his condition and was able to function normally. In 1984, Lewis began working for defendant Kmart Corporation ("Kmart"). In 1987, by virtue of his employment, he was offered and accepted an employee disability benefit plan issued by Aetna Life Insurance Company ("Aetna"). The plan provided that physical disabilities would be covered through age sixty-five, but terminated benefits for mental disabilities after twenty-four months of coverage. In 1993, plaintiff was offered and accepted a successor plan, again provided by Aetna, which contained a similar distinction in coverage between physical and mental disabilities.

In March of 1995, plaintiff's depression worsened, and he became unable to work. At first, he went on medical leave under Kmart's leave program. However, by September of 1995, he was on long-term disability and began receiving monthly long-term disability benefit payments of $2,488.16 under the Aetna plan. By the Spring of 1996, plaintiff had learned that Aetna had classified his disability as "mental" in nature and therefore subject to the two-year cap. In accordance with this classification, Aetna terminated plaintiff's benefits on September 18, 1997, two years after he first began receiving long term disability payments.

On July 2, 1996, several months before the termination of his benefits, plaintiff filed a charge with the EEOC alleging that he had been subjected to discrimination on the basis of disability because his condition had been classified as "mental" and therefore subject to the Aetna plan's twenty-four-month cutoff. *See* EEOC Charge (attached as Aetna Ex. D.).

Plaintiff then brought suit in this Court on August 6, 1997, alleging that defendants Kmart and Aetna had discriminated against him on the basis of his disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Specifically, as to Kmart, plaintiff alleged that Kmart violated his right under ADA Title I to terms and conditions of employment free from discrimination based on his disability. In various pretrial rulings, the Court ultimately granted summary judgment in Aetna's favor and narrowed the issues for trial to: (1) the date plaintiff became aware that his condition would be classified as "mental" under the benefit plan at issue and that he would receive inferior coverage as a result of such classification, and (2) whether Kmart had a sufficient actuarial justification for distinguishing between mental and physical conditions in the employee benefit plan at issue.

A bench trial was held before this Court on April 13, 1998, and post-trial briefs have now been filed. Having considered the arguments of both parties, the Court makes the findings set forth below.

II.

Notice and Accrual of ADA Claims

Mrs. Lewis testified at trial that the Lewises knew by June 17, 1996 that plaintiff's disability had been classified as "mental" under a parallel Aetna health insurance plan, and

that he would receive inferior disability benefits as a result.[1] *See* Trial Transcript at 112-14. According to Mrs. Lewis, plaintiff and she assumed that Aetna would treat his long-term disability benefits similarly, and that the disability benefits Lewis had begun receiving in September of 1995 would be subject to the two-year cap. *See id.* Plaintiff therefore alleged in his July 2, 1996, EEOC charge that "I am unfairly being paid disability benefits for only a 2 year duration with respect to my mental disability in accordance with the terms of [Kmart's] employee disability benefits plan," and gave June 17, 1996, as the latest date of discrimination. Pl. Trial Ex. 16 (EEOC Charge). Kmart presented no evidence on this issue and did not contest Mrs. Lewis' testimony. Accordingly, we find that Mrs. Lewis' testimony and the contents of plaintiff's EEOC Charge establish that the Lewises had notice as of June 17, 1996, of any discrimination against Mr. Lewis on the basis of his mental disability, and that the statute of limitations on plaintiff's cause of action began to run at that time. Plaintiff filed his EEOC Charge on July 2, 1996, sixteen days after learning that his disability would be classified as "mental" and well within the applicable 180-day limitations period. *See* February 11, 1998 Memorandum Opinion at 13. We therefore reaffirm our earlier holding that plaintiff's Title I claim against Kmart was timely filed. *See id.*

Actuarial Justification, Subterfuge and the § 501(c) "Safe Harbor"

ADA § 501(c) provides that Title I:

> shall not be construed to prohibit or restrict . . . (2) a person or organization

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[1] Specifically, plaintiff's Aetna health insurance plan capped benefits for mental disability-related health expenses at $2500. *See* Pl. Trial Ex. 16 (EEOC Charge).

> covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

42 U.S.C. § 12201(c). However, the section goes on to state that: "Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of [Title I]." *Id.* Thus, § 501(c) protects the decisions of plan sponsors and administrators only to the extent that they are consistent with state law. *See* 42 U.S.C. § 12201(c); H.R. Rep. No. 101-485, pt. 2 at 136 (1989) ("Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination.").

Kmart argues that Michigan law governs whether the Aetna plan is consistent with state law for purposes of § 501(c), and that the Aetna plan satisfies the laws of that state. In support, Kmart relies on a plan provision which states "[t]his policy will be construed in line with the law of the jurisdiction in which it is delivered." It is uncontested that the Aetna plan was delivered in Michigan. Kmart therefore argues that the plan need only comply with Michigan law. Plaintiff counters that a contractual choice of law clause applies only to breach of contract disputes and cannot constrain this Court's interpretation of federal statutes. Instead, plaintiff argues that Virginia law, which expressly applies to all foreign and domestic corporations offering insurance within the Commonwealth, should guide our analysis.

We find plaintiff's position to be the more convincing one. Although parties may agree that the law of a particular state will govern contractual disputes between them, the

interpretation of federal statutes such as 42 U.S.C. § 12201(c) is a core duty of this Court which the parties may not bargain away. Moreover, this case does not require the Court to construe the language of the Aetna plan but to determine whether its plain language violates the ADA, and is therefore outside the choice of law provision agreed to by the parties. Given Congress' apparent purpose in § 501(c) to avoid unnecessary disruption of state insurance regulation, we instead conclude that the § 501(c) consistency of a challenged disability plan is best examined within the context of the state where the disabled person lives, is employed, and receives his insurance benefits. Other courts construing § 501(c) have reached the same conclusion. *See Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 428-29 (D.N.H. 1996) (applying law of forum state to determine insurer's protection under § 501(c) safe harbor); *Chabner v. United Omaha Life Ins. Co.*, 994 F. Supp. 1185 at 1190 (N.D. Cal. 1998) (explaining that § 501(c) safe harbor incorporates state law and applying law of forum state). In this case, plaintiff lives, was employed, and received insurance benefits in Virginia. We therefore hold that Kmart's decision to offer the Aetna plan must comport with Virginia law in order for it to be protected under § 501(c).

> Virginia Code § 38.2-508 states:
>
> > No person shall [r]efuse to insure, refuse to continue to insure, or limit the amount, extent or kind of insurance coverage available to an individual . . . solely because of . . . mental or physical impairments, unless the refusal, limitation or rate differential is based on sound actuarial principles.

Accordingly, plaintiff argues, Kmart must demonstrate that its decision to offer an insurance plan limiting disability

coverage for those with mental disabilities was based on sound actuarial principles in order for the decision to be protected by § 501(c).

Kmart has not met this burden, and instead acknowledges that it had no actuarial justification for choosing the 1987 and 1993 Aetna long-term disability plans containing the mental/physical distinction at issue. *See* Trial Transcript at 145 ("There is no need for us to talk about cost actuarial. That's an alternative defense which Kmart did not seek to rely upon in this case."). Specifically, Kmart presented evidence that it was unaware in 1987 and 1993 that plans without a cap on mental disability benefits existed, despite evidence that Aetna's two largest clients used uncapped plans, that such plans have been available since the mid-1970's, and that Aetna was prepared to offer such a plan to Kmart but that Kmart requested a capped plan. *See* Def. Exs. 38 (Moreford Aff.), 39 (DeWenter Aff.), 41 (Welsh Aff.), 52 (Welsh Dep.) at 32-33, 58-59. Thus, Kmart chose both the 1987 and 1993 capped plans without engaging in any sort of cost analysis to determine whether plans which discriminated between mental and physical disabilities were less expensive than those which did not. *See* Def. Ex. 41 (Welsh Aff.) at ¶¶ 9,10.

Despite this lack of actuarial justification, Kmart argues that the Aetna plan must be deemed consistent with Virginia law because the Virginia Bureau of Insurance approved it. *See* Def. Exs. 51 (March 14, 1990, Letter from Aetna to Virginia Bureau of Insurance), 54 (March 16, 1994, Letter from Aetna to Virginia Bureau of Insurance). As an initial matter, defendant's assertion appears factually incorrect. Although the Virginia Bureau of Insurance approved Aetna's 1987 plan containing a cap on mental disability benefits, it has not approved the exact language of plaintiff's 1993 plan, which contains significant differences from earlier state-approved plans. *See* Pl. Proposed Findings

of Fact and Conclusions of Law at ¶ 49; Pl. Exs. 8, 9, 10. More importantly, we cannot accept a state regulatory body's unelaborated approval of a plan as controlling authority that the plan is non-discriminatory within the meaning of Virginia Code § 38.2-508. That is particularly true where, as here, there is no evidence that the Virginia Bureau of Insurance considered possible actuarial justifications in its decision to approve the plan. Instead, we conclude that the clear language of § 38.2-508 requires that limitations in coverage based on physical or mental disabilities be based on sound actuarial principles, and that Kmart has acknowledged a lack of such justification here. Accordingly, we hold that Kmart's selection of the 1993 Aetna plan, which specially limits benefits for disabilities that are mental rather than physical, was not consistent with Virginia state law, and that Kmart is therefore not entitled to the protections of the § 501(c) safe harbor.[2]

Rather than relying on actuarial justification, Kmart argues that the Aetna plan cannot be considered a discriminatory "subterfuge" to avoid the ADA because Kmart subscribed to it years before the enactment of that statute. In support, Kmart cites *Public Employees Retirement Sys. v. Betts,* 492 U.S. 158, 106 L. Ed. 2d 134, 109 S. Ct. 2854 (1989), in which the Supreme Court held that an employee benefit plan could not be a "subterfuge" to avoid the Age Discrimination in Employment Act ("ADEA") because the plan was adopted before the enactment of the ADEA.

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[2] Michigan law contains a similar provision prohibiting "unfair discrimination" between individuals of the "same class" or facing the "same hazard." *See* Mi. Compiled Laws Ann. § 500.2020. Accordingly, Kmart's contention that Michigan law governs here even if true, would not change our analysis.

We agree with plaintiff that *Betts* has no application here because the Aetna plan at issue was adopted in 1993, well after the enactment of the ADA. Unlike the defendant in *Betts*, Kmart chose the challenged 1993 disability plan in the face of ADA provisions which expressly prohibit an employer from discriminating against an employee on the basis of that employee's disability. *See* 42 U.S.C. § 12112(a). Although Kmart may legally have offered benefit plans limiting mental disability benefits before 1990, once the ADA was enacted, Kmart's legal obligations changed. By 1993, when Kmart chose a new disability plan, it had to comply with the ADA. Therefore, Kmart cannot claim, as did the *Betts* defendant, that it adopted the challenged plan in the absence of laws prohibiting the type of discrimination at issue.

Furthermore, Congress, when enacting the ADA, expressly declined to apply *Betts* to the ADA's § 501(c) definition of "subterfuge," explaining that:

> The term 'subterfuge' is used in the ADA simply to denote a means of evading the purposes of the ADA. It does not mean that there must be some malicious intent on the part of the insurance company or other organization, nor does it mean that a plan is automatically shielded because it was put into place before the ADA was passed. Indeed, there is currently a bill moving through Congress to overturn the Betts decision and we have no intention of repeating a decision with which we do not agree.

Statement of Rep. Edwards, 136 Cong. Rec. H4624 (daily ed. May 17, 1990); *see also* Statement of Sen. Kennedy, 136 Cong. Rec. S9697 (daily ed. July 13, 1990); Statement of

Rep. Owens, 136 Cong. Rec. H4623 (daily ed. July 12, 1990); Statement of Rep. Waxman, 136 Cong. Rec. H4626 (daily ed. July 12, 1990). Instead, Congress explained that:

> section § 501(c) makes it clear that insurers may continue to sell and to underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such products, so long as the standards used are based on sound actuarial data and not on speculation .... In sum, [the ADA] requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.

H.R. Rep. No. 45, 101st Cong., 2d Sess., pt. 3, at 70 (1990).

Previously, we explained that "the ADA clearly prohibits discrimination on the basis of disability absent some actuarial justification." October 24, 1997, Mem. Op. at 29. In this case, Kmart offered plaintiff insurance benefits which provided inferior coverage for mental as opposed to physical disabilities. It has demonstrated no actuarial justification for the dichotomy and is otherwise ineligible for the protections of the § 501(c) safe harbor. We therefore conclude that Kmart has violated 42 U.S.C. § 12112 by offering Lewis a benefit plan which discriminates against him on the basis of his mental disability. Having reached this conclusion, we must determine a proper remedy.

Damages

Kmart argues that, even if the 1993 Aetna plan violates the ADA, it would be inappropriate for this Court to mandate the continued payment of benefits under the rule established in *Los Angeles Dep't of Water and Power v.*

Manhart, 435 U.S. 702, 55 L. Ed. 2d 657, 98 S. Ct. 1370 (1978). In that case, the Los Angeles Department of Water and Power required female employees to make higher contributions toward their pensions than their male counterparts, based on actuarial evidence that they would live longer and would therefore use more benefits over time. *See id.* at 704-07. Female employees brought a class action suit against the Department, arguing that the different contribution rates applied to women violated Title VII's prohibition against gender discrimination. The Court agreed and held the plan to be unlawfully discriminatory, but concluded that it would be inappropriate to award a retroactive return of the female workers' excess plan contributions. *See id.* at 718. The Court reasoned that although retroactive awards are presumptively appropriate in discrimination cases, the large number of employees participating in the action would cause retroactive liability to have a devastating impact on the pension plan and would threaten to upset a nationwide insurance regime premised on such longevity-based differences. *See id.* at 718 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975)), *id.* at 719-23. The Court also noted that the application of Title VII to pension plans was unknown at the time plan administrators adopted such differentials, and that plan administrators could reasonably have believed their practices to be within the law. *See id.* at 720-24.

In this case, Kmart argues that forcing it to provide Lewis with long-term disability benefits until he either returns to work or turns sixty-five would unfairly penalize Kmart for selecting a plan it reasonably believed was lawful, and would have a devastating effect on its ability to provide disability insurance.

In response, plaintiff raises several equitable considerations which we agree distinguish this case from

Manhart. First, this case concerns the benefits of one person rather than an entire class of benefit recipients, making the effect of a judgment in plaintiff's favor far less onerous. Indeed, throughout this litigation, both parties have stressed that Lewis may eventually recover sufficiently from his depression to return to work, obviating the need for Kmart to continue to pay him benefits.

Second, a judgment against Kmart will not result in a windfall for Lewis or for other mentally disabled employees. In *Manhart*, ordering the defendant to refund plan contributions would have allowed women, who as a group outlive men by several years, to receive more pension benefits for the same contribution as their male counterparts. In Lewis' case, all employees participating in the plan paid the same premium, thus, there would be no inherent unfairness in awarding him benefits until age sixty-five, because in our case, mentally disabled employees by paying the same premium for less benefits have effectively been subsidizing the benefits of the physically disabled.

Third, a judgment against Kmart will not injure Kmart in any way because the Aetna plan is entirely employee-funded. Nor has Kmart presented any evidence that requiring a non-discriminatory plan can be expected to render the cost of disability insurance unaffordable or drive employees to desert Kmart for employment elsewhere. In contrast, plaintiff has presented evidence that eliminating the distinction between mental and physical disabilities can be expected to raise premiums, using liberal estimates, by only about $2.68 a month, an increase unlikely to deter present or future Kmart employees. *See* Anderson 2d Aff. at ¶ 4.[3]

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[3] This evidence was submitted with pretrial motions. Although it is not dispositive of this issue, we find it instructive in assessing the expected impact of requiring Kmart to uncap its disability plan.

Fourth, and most importantly, Kmart has presented no evidence to support its argument that requiring it to offer a non-discriminatory disability benefits plan would deleteriously affect the insurance industry as a whole. Rather, the documentary evidence shows the opposite to be true: Aetna's own expert averred that Aetna's two largest customers use non-discriminatory plans, and that such plans are both feasible and available. *See* Def. Exs. 41 (Welsh Aff.), 52 (Welsh Dep.) at 32-33, 58-59. As such, Kmart cannot convincingly argue that prohibiting discrimination against the mentally disabled in disability insurance plans raises the dire economic consequences which concerned the Supreme Court in *Manhart*.

Finally, we agree with plaintiff that, at the time it adopted the 1993 Aetna plan, Kmart should have been on notice of ADA provisions which specifically prohibit employers from discriminating on the basis of disability within the context of insurance plans. Kmart's argument that it acted innocently in the absence of laws addressing disability discrimination in insurance plans is therefore unconvincing.

Ultimately, we are left with the Supreme Court's rule that retroactive relief is presumptively appropriate in discrimination cases unless strong equitable concerns mandate otherwise. *See Manhart*, 436 U.S. at 719 ("The . . . presumption in favor of retroactive liability can seldom be overcome"), *id.* at 723. For all of the above reasons, we conclude that the concerns which convinced the Supreme Court to reject retroactive relief in *Manhart* do not pertain in this case, and do not prohibit us from mandating the continued future payment of disability benefits here.

The Appropriate Measure of Damages

Kmart argues that, in the event we order the continued payment of disability benefits, plaintiff must continue to be disabled in order to receive benefits, and his benefit payments must be adjusted to reflect the disability payments he has received from Social Security. We agree with this contention, and plaintiff does not contest it. Accordingly, we conclude that Kmart has discriminated against plaintiff on the basis of his disability in violation of ADA Title I, 42 U.S.C. § 12112, and that plaintiff is entitled to the following relief: (1) a declaration that the two-year limit on disability benefits for employees disabled by mental illness violates Title I of the ADA; and (2) a permanent injunction mandating the continued payment of monthly disability benefits according to the terms presented by Kmart in its Post-Trial Memorandum Regarding Damages, so long as plaintiff remains disabled within the meaning of the plan, until he reaches age sixty-five.

Specifically, Kmart will be required to pay benefits as follows:

1.	September 19, 1997-December 31, 1998	$3,234.61 (65% of pre-disability earnings) - 1,077.00 (SSDIB) $2,157.61 per month Pro-rated for 9/19/97-112/31/97 = $7,263.95
2.	January 1, 1998-December 31, 1998	$2,157.61 x 4% cost of living increase $2,243.91 per month

$2,243.91 x 12 months = $26,926.97

3. January 1, 1999-December 31, 1999

$2,243.91
x 4% cost of living increase
$2,333.67 per month

$2,333.67 x 12 months = $28,004.00

4. January 1, 2000-December 31, 2000

$2,333.67
x 4% cost of living increase
$2,427.02 per month

$2,427.02 x 12 months = $29,124.20

5. January 1, 2001-December 31, 2001

$2,427.02
x 4% cost of living increase
$2,524.10 per month

$2,524.10 x 12 months = $30,289.21

6. January 1, 2002-December 31, 2002

$2,524.10
x 4% cost of living increase
$2,625.06 per month

$2,625.06 x 12 months = $31,500.77

7.	January 1, 2003-March 10, 2019	$31,500.77 x 16 years = $504,012.32 + $31,500.77 x (partial term in 2019) = $6,096.21 $510,109.24
8.	Total benefits	$663,218.34 (sum of numbers 1-7 above) - 8,685.57 (overpayment 1995-1997) $654,532.77

Attorney's Fees

Finally, Kmart argues that plaintiff's counsel is not entitled to costs or attorneys' fees because plaintiff did not present evidence of these amounts at trial. We reject this argument. As plaintiff points out, Fed. R. Civ. P. 54(d)(2) allows an attorney to present such issues in a post-trial motion. Plaintiff must file such a claim within thirty (30) days of this Memorandum Opinion and Kmart will have an opportunity to respond to it.

The Court will enter judgment in accordance with these findings in an appropriate order.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FILED
August 2, 1999

No. 98-2179
CA-97-1230-A

HAROLD LEWIS,
Plaintiff-Appellee,

v.

KMART CORPORATION,
Defendant-Appellant,

AND

AETNA INSURANCE COMPANY, AETNA LIFE INSURANCE COMPANY,
Defendants.

NATIONAL RETAIL FEDERATION; CHAMBER OF COMMERCE; EQUAL EMPLOYMENT ADVISORY COUNCIL; AMERICAN COUNCIL OF LIFE INSURANCE; THE HEALTH INSURANCE ASSOCIATION OF AMERICA; THE NATIONAL ALLIANCE FOR THE MENTALLY ILL; EMPLOYMENT LAW CENTER; AMERICAN PSYCHIATRIC ASSOCIATION; DISABILITY RIGHTS ADVOCATES; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS; NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION; WORLD INSTITUTE OF DISABILITY; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amici Curiae.

On Petition for Rehearing and Rehearing En Banc

Appellee filed an unopposed motion for leave to file reply memorandum in support of the petition for rehearing and suggestion for rehearing en banc.

The Court grants the motion and accepts appellee's proposed reply as filed.

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FILED
August 10, 1999

No. 98-2179
CA-97-1230-A

LEWIS v. K-MART CORPORATION

MANDATE

The judgment of this Court dated 6/16/99 takes effect today.

PATRICIA S. CONNOR

CLERK

APPENDIX E – EXCERPTS FROM 42 U.S.C. §§ 12101, 12112, and 12201

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discriminationon the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation,

and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges and employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the

opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability . . . .

§ 12201 Construction

* * *

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

Supreme Court, U.S.
FILED
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(2)

No. 99-747

IN THE

Supreme Court of the United States

HAROLD LEWIS,

Petitioner,

v.

KMART CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN C. FOX
Counsel of Record
TIFFANY A. BASSETT
FENWICK & WEST LLP
Counsel for Respondent
Two Palo Alto Square
Palo Alto, CA 94306
(650) 858-7144

156908

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

19 RP

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly held that Title I of the Americans with Disabilities Act of 1990 does not require a long-term disability plan to provide the same level of benefits for mental and physical disabilities.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Kmart Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

1. This Court's recent decision in *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), does not affect, let alone conflict with, the decision below of the United States Court of Appeals for the Fourth Circuit, or the unanimous decisions of every other circuit to address the precise issue presented in this case. Because there is no conflict between *Olmstead* and the decision below, and because there is no conflict among the circuit courts, the Petition for a Writ of Certiorari should be denied.

2. Subsequent to this Court's decision in *Olmstead*, and based entirely upon footnote ten of the majority opinion in *Olmstead*, petitioner sought a rehearing or rehearing *en banc* before the Fourth Circuit. With the benefit of the *Olmstead* decision, the Fourth Circuit summarily denied the petition for rehearing or rehearing *en banc*.

3. Contrary to petitioner's representation in his petition, no "judicial disarray" exists with respect to the issue decided by the Fourth Circuit below. Rather, every circuit to address the precise issue presented in this case has held that Title I of the ADA does not require a long-term disability plan to provide equal benefits for mental and physical benefits. *Kimber v. Thiokol Corp.*, *No.* 98-4106, 1999 U.S. App. LEXIS 29533 (10th Cir. November 12, 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

REASONS FOR DENYING THE WRIT

Petitioner's reliance on *Olmstead* for the proposition that the ADA mandates mental health parity in employee benefits, and therefore conflicts with the decision below, is misplaced since there is nothing new here, as evidenced in four different ways. First, *Olmstead* construed the express statutory and regulatory language of Title II of the ADA forbidding unjustified isolation of individuals. No such language exists in Title I of the ADA to cause it to mandate parity in benefits for mental and physical conditions. Moreover, because of its limited factual and legal inquiry, *Olmstead* did not address whether disparities in disability benefits for mental and physical long-term disability ("LTD") benefits constitute unlawful discrimination under Title I of the ADA. Second, *Olmstead* did not overrule precedent concerning benefits cases upon which the Fourth Circuit properly relied below. Third, the Fourth Circuit below properly anticipated this Court's discussion in *Olmstead*, at any rate, by specifically addressing *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), upon which footnote ten of *Olmstead* relies. Finally, the recent passage of the Mental Health Parity Act (not mandating mental and physical impairment parity in the context of LTD benefits) confirms that differing benefit levels for mental and physical conditions in LTD plans is not unlawful discrimination.

In addition, petitioner's other argument that this issue raises a "vital and recurring question arising under important federal anti-discrimination statutes" is simply unavailing. To the extent the issue has arisen, the circuit courts are unanimous in declaring that the at-issue benefit differential does not constitute unlawful discrimination.

I. THIS COURT'S DECISION IN *OLMSTEAD* DOES NOT AFFECT, LET ALONE CONFLICT WITH, THE RULING BELOW.

This Court's interpretation of Title II of the ADA in *Olmstead* is inapplicable to the sole legal issue by the Fourth Circuit decided — whether the ADA mandates parity in long-term disability benefits for mental and physical disabilities. Rather, in *Olmstead*, two institutionalized mentally disabled women charged the state of Georgia with violating Title II of the ADA by maintaining them in a central mental facility although they were qualified for community based placement. This Court held that such "segregation" constituted unlawful discrimination under the ADA.

Relying exclusively on footnote ten of the majority opinion, petitioner argues that this Court's decision in *Olmstead* essentially invalidates any argument that intra-group differences in employee benefits is permissible under the ADA. Petitioner is wrong for three reasons: (1) In *Olmstead*, this Court relied on "explicit language" in Title II of the ADA forbidding "unjustified isolation" of the disabled wholly unrelated to the issue presented in this case; (2) *Olmstead* did not overrule the Court's earlier Rehabilitation Act cases involving disparity in insurance benefits, upon which the Fourth Circuit properly relied below in this Tile I ADA case; and (3) the Fourth Circuit below properly anticipated this Court's discussion in *Olmstead*, at any rate, by specifically addressing *O'Connor*, 517 U.S. 308, 312, upon which footnote ten of *Olmstead* relies.

A. The *Olmstead* Decision Construed Explicit Statutory And Regulatory Language Forbidding "Unjustified Isolation" Of The Disabled Not Present Here.

In *Olmstead*, this Court concluded that the State of Georgia discriminated against two women with mental illness in violation of Title II of the ADA by keeping them institutionalized when the state could have transferred them to a community setting. *Olmstead*, 119 S. Ct. at 2185. The Court based its holding on express statutory and regulatory language providing that "unjustified institutional isolation of persons with disabilities is a form of discrimination," *Id.* at 2187, and found it immaterial that the plaintiffs "identified . . . no similarly situated individuals given preferential treatment." *Id.* at 2186.

In dissent, Justice Thomas contended that the Court previously had "never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class." *Id.* at 2194 (Thomas, J., dissenting). The majority responded with a reference to *O'Connor*, 517 U.S. 308, a case arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA). *Olmstead*, 119 S. Ct. at 2186 n.10. *O'Connor* held that since the ADEA prohibits discrimination "because of" age, a plaintiff need not show that his replacement was outside the protected class, which is limited to those 40 years of age and over.[1]

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1. As the Court explained, "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." 517 U.S. at 313.

Petitioner argues incorrectly that this footnote should change the outcome of the instant case. It should not. Olmstead stands for the limited proposition that unnecessary institutionalization is a type of segregation, and thus is unlawful discrimination "because of" disability, much like racial segregation is race discrimination. *Id.* at 2187. The Court's decision was grounded in express language of the ADA and regulatory interpretation, none of which is present here.

Here, no such explicit language, whether in the statute or supporting agency interpretations, exists to support a similar finding with regard to the at-issue benefit distinction. Moreover, as recognized by the five circuits to have addressed this issue, relevant legislative history, Supreme Court and federal circuit court precedent addressing the Rehabilitation Act, and subsequent legislation all reinforce the conclusion that Congress never intended or considered disability insurance benefit limitations — and in particular limitations on benefits for mental/nervous conditions — to be unlawful discrimination under the ADA.

B. *Olmstead* Did Not Overrule Earlier Rehabilitation Act Cases Involving Insurance Benefits.

In the decision below, the Fourth Circuit properly noted that courts generally view the Rehabilitation Act as " 'the most appropriate starting point for [a] discussion of the ADA' " because the two statutes have the same definition of and operational language concerning disability. *Lewis v. Kmart*, 180 F.3d 166 (4th Cir. 1999), *citing*, *Rogers v. Department of Health & Envtl. Control*, 174 F.3d 431, 433 (4th Cir. 1999). Accordingly for purposes of interpreting the at-issue limitation on disability benefits, the court below

relied, in part, upon Supreme Court precedent interpreting similar provisions under the Rehabilitation Act.

This Supreme Court precedent has clearly established that benefit limitations such as the at-issue plan do *not* violate the Rehabilitation Act. *See Traynor v. Turnage*, 485 U.S. 535, 549 (1988) ("there is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons"); *Alexander v. Choate*, 469 U.S. 287 (1985). *Olmstead* did not address, much less overrule, these landmark cases upon which the Fourth Circuit properly relied.

C. The Fourth Circuit Below Anticipated The Court's Discussion In *Olmstead.*

In his petition, petitioner attempts to argue that this Court should review the Fourth Circuit's decision because the Fourth Circuit did not have the benefit of the Court's statement in *Olmstead.* However, the unanimous decision below expressly and properly anticipated the Supreme Court's discussion in *Olmstead* by discussing the language in this Court's decision in *O'Connor*, which the *Olmstead* majority cited in footnote ten. The *Lewis v. Kmart* parties not only briefed the *O'Connor* issues before the Fourth Circuit, but also orally argued its effect, if any, to the *Lewis v. Kmart* case. More importantly, the *Lewis v. Kmart* panel opinion expressly discussed *O'Connor* in the final section of its opinion and stated: "We conclude *O'Connor* is of no help to Lewis."

The panel opinion then went on to distinguish application of *O'Connor* by reference to the decision in the United States

Supreme Court in *Traynor v. Turnage*, 485 U.S. 535 (1988). In addition, the panel also offered another reason to reject reliance on *O'Connor* as applied to the *Lewis v. Kmart* case: "Second, reliance on *O'Connor* simply does not make intuitive sense." 180 F.3d at 171.

In sum, the Supreme Court's reference in *Olmstead* to *O'Connor* added no new law to the calculus affecting the Fourth Circuit's decision below. Moreover, in deciding petitioner's Petition for Rehearing or Rehearing *En Banc* to the Fourth Circuit, the entire Fourth Circuit had the benefit of this Court's decision in *Olmstead* in reaching its conclusion to let the decision below remain intact. Despite petitioner's arguments to the contrary, *Olmstead* provides no new assistance to petitioner's position.

D. The Recent Passage Of The Mental Health Parity Act Confirms That Differing Benefit Levels For Mental And Physical Conditions In Long-Term Disability Plans Is Not Unlawful Discrimination.

As the Third Circuit pointed out in *Ford v. Schering-Plough*, 145 F.3d 601, 610 (3d Cir. 1998), *cert. denied*, 142 L. Ed. 2d 704 (1999), the Sixth Circuit in *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1018 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998), and the Seventh Circuit in *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996), recent Congressional action confirms the conclusion that the ADA does not require parity in coverage for physical and mental conditions in disability plans. Congress passed the Mental Health Parity Act of 1996, 29 U.S.C. § 1185(a), in September of 1996. This statute requires parity in benefits provided in *health insurance policies*, not disability plans. Indeed, the Sixth Circuit observed in *Parker* that:

> While Congress likely realized that equality between the two types of disabilities [mental and physical] was not covered by the ADA, it sought to remedy the absence only in the context of health insurance coverage, not long-term disability policies. Thus, it appears that Congress did not believe the necessity for parity between mental and physical disabilities in long-term disability plans was sufficiently compelling to include them within the purview of the [Mental Health Parity] Act.

Parker, 121 F.3d at 1018[2]

Even in the context of health insurance coverage, however, the Mental Health Parity Act mandates only limited parity. Parity is required *only* with regard to annual and lifetime limits. Parity is *not* required with regard to the number of treatments a person is to receive or the number of office visits he or she may have. Moreover, demonstrating its extreme caution towards a parity mandate, Congress legislated that if the parity requirements increase an employer's costs by a mere one percent, parity is not required. 29 U.S.C. § 1185(a).[3]

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2. In a footnote following this conclusion, the Sixth Circuit indicated that, "[t]he converse cannot be argued: Congress did not need to include long-term disability plans in the Mental Health Parity Act because the ADA required parity in such plans. It simply cannot be the case that the ADA would cover long-term disability plans but not group health insurance plans." *Parker*, 121 F.3d at 1018 n.16.

3. Additionally, legislation was introduced in both the House and Senate last year entitled the "Substance Abuse Treatment Parity

(Cont'd)

The recent passage of the Mental Health Parity Act demonstrates two points. One, as noted in *Parker*, Congress never meant for the ADA to address the idea of parity between physical and mental benefits as additional legislative action was necessary to provide specifically defined parity requirements. As Senator Domenici, a co-sponsor of the Senate version of the Mental Health Parity Act, commented during debate, "[e]ssentially, this is a compromise to *begin* down the path [to] parity. . . ." 142 Cong. Rec. S9917 (daily ed. Sept. 5, 1996) (statement of Sen. Domenici) (emphasis added).

Two, as further noted by the Sixth Circuit in *Parker*, Congress had every opportunity to provide parity in benefits in disability plans in this legislation *recently* passed, yet declined to do so. In fact, the Act that eventually passed was initially defeated when proposed as an amendment to the Health Insurance Portability and Accountability Act of 1996, an Act designed to improve health care coverage. *See* 142 Cong. Rec. S9477-02 (daily ed. Aug. 2, 1996) (statement of Sen. Moynihan). The Seventh Circuit took note of this fact in ruling that the ADA did not require parity:

> This is a well-illustrated by the debate over a proposed amendment to the health Insurance

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(Cont'd)
Act of 1997." These bills would require parity and nondiscriminatory application of treatment limitations and financial requirements for substance abuse treatment benefits under private group and individual health plans that offer such treatment benefits in addition to medical and surgical benefits. The bills exempt employers with 50 or fewer employees. *See* S. 1147 and H.R. 2409, 105th Cong. (1997). These proposed bills further indicate that Congress does not view the ADA as mandating parity in employer provided benefits.

> Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996). The amendment, which was defeated before final passage of the bill, would have required parity of coverage for mental and physical conditions. *See* 142 Cong. Rec. S9477-02 (daily ed. Aug. 2, 1996) (statement of Sen. Heflin). This debate reinforces our conclusion that the issue of parity among physical and mental health benefits is one that is still in the legislative arena.

CNA, 96 F.3d at 1044.

Clearly, Congress was not ready to mandate such additional costs that sweeping parity requirements would bring to employers at this point in time. Implicit in Congress' decision to defer passage of a comprehensive parity statute, and the forceful debate over this issue, is the clear recognition that no statute currently exists that mandates such parity in disability plans, and the only parity statute that exists renders the parity requirement inapplicable when costs become more than a *de minimis* expense for employers.

II. THE CIRCUIT COURTS ARE UNANIMOUSLY IN ACCORDANCE WITH THE DECISION BELOW.

In addition, petitioner also argues that this Court should grant review because the question presented raises a "vital and recurring" question arising under important federal anti-discrimination statutes. To the extant the question has arisen, the circuit courts have unanimously declared that the ADA does not mandate equal long-term disability benefits for mental and physical disabilities.

Five circuits courts have addressed the precise legal issue presented in this case and have all concluded that a distinction in long-term disability benefits for mental and physical disabilities does not violate the ADA. *Kimber v. Thiokol Corp.*, No. 98-4106 (10th Cir. November 12, 1999); *Lewis v. Kmart*, 180 F.3d 166 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3rd Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

Moreover, the Second, Eighth and District of Columbia Circuits have also held the ADA and/or Rehabilitation Act are not violated by providing the same package of benefits to all eligible employees, so long as people with disabilities are provided with the same benefits as people without disabilities. *Castellano v. City of New York*, 142 F.3d 58, 70 (2d Cir.) (ADA and Rehabilitation Act), *cert. denied*, 119 S. Ct. 60 and 119 S. Ct. 276 (1998); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996) (ADA); *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996) (Rehabilitation Act), *cert. denied*, 117 S. Ct. 772 (1997).

There is no discordance among the circuits in resolving the precise issue presented in this case. The decision below simply conforms to the ever-growing list of circuit decisions declaring the at-issue benefit distinction to be lawful under the ADA.

CONCLUSION

For the reasons given above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN C. FOX
Counsel of Record
TIFFANY A. BASSETT
FENWICK & WEST LLP
Counsel for Respondent
Two Palo Alto Square
Palo Alto, CA 94306
(650) 858-7144

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No. 99-747

IN THE

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HAROLD LEWIS,

Petitioner,

v.

KMART CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

JOHN C. FOX
Counsel of Record
TIFFANY A. BASSETT
FENWICK & WEST LLP
Counsel for Respondent
Two Palo Alto Square
Palo Alto, CA 94306
(650) 858-7144

157254

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

300

Respondent Kmart Corporation respectfully submits this Supplemental Brief in Opposition to Petitioner Harold Lewis' Petition for a Writ of Certiorari to alert the Court to new case law, pursuant to United States Supreme Court Rule 15.

In its initial brief in Opposition, Respondent stated that every circuit to address the precise issue presented in this case has held that Title I of the ADA does not require a long-term disability plan to provide equal benefits for mental and physical benefits. *Kimber v. Thiokol Corp., No.* 98-4106, 1999 U.S. App. LEXIS 29533 (10th Cir. November 12, 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

On January 3, 2000, the Ninth Circuit joined the list of unanimous circuit courts in accord with the Fourth Circuit below. In *Weyer v. Twentieth Century Fox Film Corp.*, 2000 WL 1643 (9th Cir. (Wash.)), the Ninth Circuit addressed the precise issue presented below and ruled that Title I of the ADA does not require a long-term disability plan to provide equal benefits for mental and physical benefits. *Id.* at *10. In addition, the *Weyer* court discussed and dismissed the plaintiff's contention that this Court's decision in *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), altered the reasoning or the validity of the great weight of authority cited above. *Id.*

For the reasons set forth above and in Respondent's Brief in Opposition, this Court should deny the Petition for Writ of Certiorari.

Dated: January 11, 2000

Respectfully submitted,

JOHN C. FOX
Counsel of Record
TIFFANY A. BASSETT
FENWICK & WEST LLP
Counsel for Respondent
Two Palo Alto Square
Palo Alto, CA 94306
(650) 858-7144

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No. 99-747

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MARY GILIBERTI
BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W., #1212
Washington, D.C. 20005
(202) 467-5730

VICTOR M. GLASBERG
VICTOR M. GLASBERG & ASSOCIATES
121 S. Columbus St.
Alexandria, VA 22314
(703) 684-1100

JERROLD J. GANZFRIED
Counsel of Record
KERRY L. ADAMS
JULIE B. GREENISEN
JOHN F. STANTON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner Harold Lewis

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The petition explains why certiorari is warranted to resolve the question whether the ADA permits discrimination between disabilities of mental and physical causation that *lacks an actuarial or other non-discriminatory justification.* By failing to address the question actually presented, respondent effectively demonstrates why this case merits review. Without so much as mentioning the core insurance concept of actuarial justification, the brief in opposition inaccurately accuses petitioner of reading the ADA to require "parity" between mental and physical disabilities in all events. But petitioner merely seeks equal allocation of wage-replacement benefits to employees having the same degree of disability, regardless of mental or physical causation, in the absence of sound actuarial principles. Pet. 5-6 & n. 4.

None of respondent's arguments warrants denial of the petition, which presents an issue affecting vast numbers of employees who are denied long-term wage-replacement benefits that employers bestow on incapacitated colleagues suffering from the same disability, *i.e.*, the medically certified inability to work. There is every reason to grant review in this case to stop employers from violating the ADA by discriminating—without actuarial or other justification—against the mentally disabled in favor of the physically impaired, in direct contradiction of the Court's unambiguous statement in *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999). The case is in the ideal posture for review, coming to this Court with a fully developed trial record. A further reason for review is the rapidly accelerating pace with which the courts of appeals are facing the question presented in this case—the Ninth and Tenth Circuits issued opinions on the subject in the brief period since the petition was filed.[1]

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[1] *Weyer v. Twentieth Century Fox Film Corp.*, No. 98-35215, 2000 U.S. App. LEXIS 11 (9th Cir. Jan. 3, 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999). *See infra* at 4 & n.3.

In that same period, the Second Circuit issued an opinion that generally supports petitioner's reading of the ADA. In *Pallozzi v. Allstate Life Insurance Co.*, No. 98-7552, 1999 U.S. App. LEXIS 31224 (2d Cir. Dec. 1, 1999), the Second Circuit addressed the ADA's pleading requirements under Title III where coverage was denied without actuarial justification. The court held that lack of actuarial justification need not be pleaded explicitly where the plaintiff alleged violations of state law and of Title III. *Id.* at *25. Thus, the Second Circuit left undisturbed the district court's underlying finding that "an individual may not be denied insurance coverage based on a disability unless such denial is based upon sound risk classification," and remanded the case for trial. *Id.* at *23 (citing *Pallozzi v. Allstate Life Ins. Co.*, 998 F. Supp. 204, 207 (N.D.N.Y. 1998)). In another case, *Leonard F. v. Israel Discount Bank*, No. 98-7320, 1999 U.S. App. LEXIS 32096 (2d Cir. Dec. 8, 1999), the Second Circuit decided a different issue under the ADA, but noted the district court's finding that the disparity in benefits was consistent with New York state law. Also, after the petition was filed, the Surgeon General issued a

1. There is no merit to respondent's contention that petitioner is relying "exclusively on footnote ten" of *Olmstead* (Br. in Opp. 3). Far from offering dictum or some inconsequential point, that footnote fortifies the foundation for the entire *Olmstead* ruling. The Court's majority rejected the dissent's notion that federal statutes do not prohibit discrimination among members of the same protected class, and explained the historical basis for construing the ADA to bar discrimination between the physically and mentally disabled.

Nor is there any merit to respondent's effort to distinguish *Olmstead* on the grounds that it interpreted Title II of the ADA, while the instant case arises under Title I. As even the lower court recognized, "there is no material distinction" between these two titles for purposes of deciding the question presented here. Pet. App. 9a. There is, accordingly, no basis for respondent's assertion (Br. in Opp. 5) that express statutory and regulatory language in Title II mandated the result in *Olmstead*, while Title I contains "no such explicit language." On the contrary, Title I *does* contain explicit language barring the challenged conduct with as much particularity as any Title II language noted in *Olmstead*.[2] Title I prohibits discrimination in providing "fringe benefits" (42 U.S.C. § 12112(b)), and Title V, which otherwise limits the application of Title I, exempts discrimination only where a bona fide benefit plan is based

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report documenting the societal stigma and prejudice that persists against mental illness. *See* U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* (issued Dec. 13, 1999).

[2] In any event, the supposed "explicit language" cited by respondent did not come from Title II, but rather was the Court's paraphrase of several ADA provisions supporting its conclusion. *See* 42 U.S.C. § 12101(a)(2), (3), (5).

on "underwriting risks," "classifying risks," or "administering such risks," and is "not inconsistent with State law." 42 U.S.C. § 12201(c)(2). The ADA thus expressly mandates plan distinctions based on traditional risk assessment and incorporates the Virginia insurance statute that bars distinctions in insurance coverage unless "based on sound actuarial principles." Va. Code Ann. § 38.2-508.

Despite this explicit statutory imperative, respondent offered no actuarial justification for cutting off wage-replacement benefits to the mentally disabled after two years, while awarding such benefits until retirement age to employees unable to work for physical reasons. In fact, the undisputed record demonstrates that there is no actuarial principle justifying respondent's discriminatory allocation of long-term wage benefits. Pet. 5-6; Pet. App. 45a.

2. Review is necessary to implement this Court's interpretation of the ADA as prohibiting discrimination between mental and physical disabilities. Summarily denying rehearing shortly after *Olmstead*, the Fourth Circuit became the first of three courts of appeals to ignore this Court's articulation of the ADA's antidiscrimination provisions, while incorrectly clinging to rulings under its predecessor, the Rehabilitation Act. *See Weyer v. Twentieth Century Fox Film Corp.*, 2000 U.S. App. LEXIS 11 (9th Cir. Jan. 3, 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999).[3] As the petition explains (Pet. 14-16), Rehabilitation

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[3] The Tenth Circuit, like the Fourth Circuit in the instant case, completely ignored *Olmstead*. In *Weyer*, the Ninth Circuit incorrectly rejected the applicability of *Olmstead* on grounds similar to those asserted by respondent. That is, the Ninth Circuit addressed whether the ADA requires parity in all circumstances, not whether the ADA requires that any disparity must be based on a valid justification. *Weyer*, 2000 U.S. App. LEXIS 11, at **31-35.

Act precedent does not conflict with petitioner's position nor could it possibly outweigh *Olmstead*'s controlling construction of the broader ADA. These latest cases confirm the need for this Court's review of the important and recurring question presented in this case. The continuing proliferation of decisions—based on the false premise that disparate treatment need not be justified—vividly highlights the need for this Court to clarify the import of *Olmstead* for the entire ADA.

3. There is no merit to respondent's reliance on the weakest and most unreliable form of legislative history—Congress's rejection of an amendment to an entirely different statute years after the ADA was enacted. By heavily relying on the Mental Health Parity Act of 1996, which addresses mental illness for health insurance plans but not for disability plans, respondent underscores the error of its statutory analysis. It is most dangerous to construe a statute (the ADA) in light of later legislative inaction, such as the MHPA's failure to include certain amendments. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted); *see United States v. Wise*, 370 U.S. 405, 411 (1962). It is just as likely that Congress did not address long-term benefit plans in the MHPA—by mandating "parity" or otherwise—because Congress was satisfied with the ADA's mandate that disparities in benefits be grounded in sound actuarial data. Indeed, the MHPA expressly excludes coverage of terms or conditions relating to mental health benefits other than lifetime caps or annual limits, suggesting that Congress intended the ADA to continue to govern insurance conditions not within the scope

of the MHPA. *Compare* 42 U.S.C. § 300gg-5(b)(2) with 42 U.S.C. § 12201(c).

More generally, respondent's recitation of views articulated years after enactment of the ADA is contrary to basic rules of statutory construction. Only the intent of the Congress that promulgated the ADA, not that of subsequent Congresses, has any relevance to the statutory construction question presented here. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 33-34 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) ("The views of members of a later Congress . . . are entitled to little if any weight"); *United States v. Price*, 361 U.S. 304, 313 (1960); *see also Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993) (the failure of future Congresses to enact subsequent measures has little if any bearing on interpretation of the statute at issue); *accord Hodgson v. Lodge 851, Int'l Ass'n of Machinists & Aerospace Workers*, 454 F.2d 545, 562 (7th Cir. 1971) (Stevens, J., dissenting) ("a provision in [a] controversial and integrated statute . . . cannot fairly be predicated on unexplained inaction by different Congresses in subsequent years").[4]

In any event, the MHPA offers no insight regarding even 1996 congressional understanding of the ADA because the more recent Act applies only to annual and lifetime dollar limits for mental and physical health insurance coverage under a group health plan, and requires complete parity between coverage for mental and physical illness unless such parity will increase the cost of the plan by more than one

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[4] Respondent's reliance on congressional failure to enact proposed 1997 Substance Abuse Treatment Parity legislation fails for the same reasons applicable to the MHPA. *See* Br. in Opp. 8-9, n. 3. The rejection of substance abuse parity is even less relevant to construing the ADA than is the MHPA's failure to cover disability benefits.

percent. *See* 42 U.S.C. § 300gg-5(c)(2). By contrast, the ADA prohibits discrimination in the provision of fringe benefits generally (including disability benefits not covered under the MHPA), and exempts any bona fide benefit plan with actuarially or medically justified terms. Accordingly, the passage of the MHPA is no help for respondent's incorrect construction of the ADA. *See* Note, *Must Insurers Treat All Illnesses Equally?*, 4 CONN. INS. L.J. 767, 787 n.87 (1997) (explaining that enactment of the MHPA fails to demonstrate any congressional view that "the ADA [does] not preclude mental health limitations in insurance plans").

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or, alternatively, granting certiorari, vacating the judgment below, and remanding for reconsideration in light of *Olmstead*.

Respectfully submitted.

MARY GILIBERTI
BAZELON CENTER FOR
MENTAL HEALTH LAW
1101 15th Street, N.W., #1212
Washington, D.C. 20005
(202) 467-5730

VICTOR M. GLASBERG
VICTOR M. GLASBERG
& ASSOCIATES
121 S. Columbus St.
Alexandria, VA 22314
(703) 684-1100

JERROLD J. GANZFRIED
Counsel of Record
KERRY L. ADAMS
JULIE B. GREENISEN
JOHN F. STANTON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
Harold Lewis

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No. 99-747

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In the Supreme Court of the United States

HAROLD LEWIS,
Petitioner

v.

KMART CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

MARY GILIBERTI
BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W., #1212
Washington, D.C. 20005
(202) 467-5730

VICTOR M. GLASBERG
VICTOR M. GLASBERG & ASSOCIATES
121 S. Columbus St.
Alexandria, VA 22314
(703) 684-1100

JERROLD J. GANZFRIED
Counsel of Record
KERRY L. ADAMS
JULIE B. GREENISEN
JOHN F. STANTON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner Harold Lewis

4pp

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.8, petitioner respectfully submits this supplemental brief to call the Court's attention to a new judicial decision that was not available at the time of the party's last filing.

Petitioner's reply brief was filed on January 12, 2000. Among other cases, that brief discussed the Second Circuit's recent decision in *Pallozzi v. Allstate Life Insurance Co.*, No. 98-7552, 1999 U.S. App. LEXIS 31224 (2d Cir. Dec. 1, 1999). *See* Reply Br. 2 n.1. On January 13, 2000—the day after the reply brief was filed in this Court—the Second Circuit issued an amended opinion in *Pallozzi* in response to a petition for rehearing. Pertinent to the case *sub judice*, the Second Circuit's amended opinion states:

> Allstate argues further that our interpretation of the ADA will require federal courts to become deeply involved in questions traditionally left to state regulation, such as whether a differential was actuarially justified. If so, that is because of what Congress has mandated. If Congress had intended to insulate insurance underwriting practices from federal court scrutiny under the ADA, it would have been a very simple matter to say so. Instead, Congress exempted underwriting practices only to the extent that they "are based on or not inconsistent with State law." 42 U.S.C. § 12201(c). This formulation inescapably requires federal courts to determine whether the practice complained of conforms to state law.

Pallozzi v. Allstate Life Ins. Co., Docket No. 98-7552, 2000 U.S. App. LEXIS 589, at *4 (2d Cir. Jan. 13, 2000) (amended opinion).

The Second Circuit's latest opinion bears upon issues discussed in the pending petition in this case (see Pet. 16-21) and the reply brief (at 1-5). Accordingly, this newly issued opinion should be part of this Court's consideration of the need to resolve the disarray among the lower courts on the question whether the ADA requires that any disparity must be supported by actuarial or other non-discriminatory justification.

Respectfully submitted.

MARY GILIBERTI
BAZELON CENTER FOR
MENTAL HEALTH LAW
1101 15th Street, N.W., #1212
Washington, D.C. 20005
(202) 467-5730

VICTOR M. GLASBERG
VICTOR M. GLASBERG
& ASSOCIATES
121 S. Columbus St.
Alexandria, VA 22314
(703) 684-1100

JERROLD J. GANZFRIED
Counsel of Record
KERRY L. ADAMS
JULIE B. GREENISEN
JOHN F. STANTON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
Harold Lewis

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* FOR THE NATIONAL ALLIANCE FOR THE MENTALLY ILL AND THE AMERICAN ASSOCIATION OF RETIRED PERSONS SUPPORTING THE PETITIONER

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ERIC L. SIEGEL
(Counsel of Record)
THE SIEGEL LAW FIRM
1730 K Street, NW
Suite 1107
Washington, D.C. 20006
(202) 955-3012

RONALD S. HONBERG
NATIONAL ALLIANCE FOR THE MENTALLY ILL
200 N. Glebe Road
Suite 1015
Arlington, VA 22203
(703) 524-7600

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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In the Supreme Court of the United States

OCTOBER TERM, 1999

HAROLD LEWIS,
Petitioner

v.

KMART CORPORATION,
Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICI CURIAE*
FOR THE NATIONAL ALLIANCE FOR THE MENTALLY ILL AND THE AMERICAN ASSOCIATION OF RETIRED PERSONS SUPPORTING THE PETITIONER

INTEREST OF AMICI[1]

The National Alliance for the Mentally Ill (NAMI) is the nation's leading grassroots advocacy organization solely dedicated to improving the lives of persons with severe mental illnesses. NAMI has more than 185,000 members and 1,200 state and local affiliates in all 50 states, the District of Columbia, Puerto Rico, and Canada. NAMI's efforts focus on support to persons with severe mental illnesses and their

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[1] *Amici* certify that no one other than am*ici* contributed to the writing of this brief. Both Petitioner and Respondent have consented to the filing of this brief.

families; advocacy for nondiscriminatory and equitable federal, state, and private-sector policies; research into the causes, symptoms and treatments for brain disorders; and education to eliminate the pervasive stigma towards severe mental illnesses. An important aspect of NAMI's mission is to advocate for fair and non-discriminatory long-term disability insurance benefits for people with severe mental illnesses.

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed, and many of those rely on their employers for the provision of all their benefits, including long-term disability insurance. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985, filed more than 180 *amicus* briefs before this court and the federal appellate and district courts.

STATEMENT OF THE CASE

Harold Lewis worked for more than ten years for the Kmart Corporation. During the course of his employment, he purchased a long-term disability policy available to Kmart employees to create security for himself and his family should he become severely disabled and unable to work. Mr. Lewis paid the total costs of the premiums for this policy. Although he has suffered since 1979 from major depression, a biologically based brain disorder, his condition was sufficiently stable to enable him to work for many years in managerial level positions for Kmart.

In 1995, Mr. Lewis' major depression worsened and he was forced to take leave from his work. He was deemed to be totally disabled within the meaning of his long-term disability policy, and commenced receiving benefits under this policy in September, 1995. He was subsequently informed that conditions classified as "mental and nervous" under the plan were subject to a 24 month cap, and his benefits would therefore be terminated in September, 1997. Conditions classified as "physical" under the plan were not subject to any cap on benefits, and individuals deemed to qualify for long-term disability benefits based on physical disabilities were therefore eligible to receive benefits through age 65. In August, 1997, Mr. Lewis filed suit in the United States District Court for the Eastern District of Virginia, alleging that Kmart had violated Title I of the Americans with Disabilities Act (ADA).[2]

At trial, Kmart offered no evidence, actuarial or otherwise, to justify the 24 month cap on benefits for people who suffer from "mental/nervous" conditions. In contrast, Mr. Lewis provided abundant evidence to support his position that no justifiable basis exists for imposing 24 month caps on long-term disability benefits for persons with mental disabilities. Thus, the district court entered judgement in favor of Mr. Lewis.[3] However, the U.S. Court of Appeals for the Fourth Circuit reversed, holding that Title I of the ADA does not protect people with mental disabilities from limitations in employer provided long-term disability benefits which are not imposed on other recipients of those benefits.[4] In so doing, the

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[2] Mr. Lewis also filed a claim under Title III of the ADA against the insurance provider, Aetna Life Insurance Company, but this claim was later dismissed on statute of limitations grounds.

[3] *Lewis v. Kmart*, 7 F. Supp. 2d 743 (E.D.Va. 1998).

[4] *Lewis v. Kmart*, No. 98-2179 (4th Cir., 1999).

court, in effect, held that employers and insurance companies do not have to provide actuarial or other justification for policies that single out discreet groups of people with disabilities for lower levels of coverage in long-term disability benefits.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision misinterprets the intent and plain meaning of the ADA, as well as applicable case-law. If allowed to stand, its decision will permit insurers to continue unabated a pattern of discrimination against persons with mental disabilities in long-term disability policies, despite the absence of actuarial, medical or other evidence to justify this practice. The Fourth Circuit's decision is entirely inconsistent with the spirit and purpose of the ADA, enacted to prevent indefensible discrimination against persons with disabilities based on nothing more than historical prejudice and stigma. This is precisely the type of discrimination that is present in this case. There has been considerable confusion and disagreement among lower federal courts about how the ADA applies to the imposition of arbitrary caps on benefits for specific conditions in long-term disability policies. The Court's review is therefore needed to provide a clear framework for adjudicating cases such as this one.

I. THE FOURTH CIRCUIT'S RULING BELOW WAS INCORRECT AS A MATTER OF LAW BECAUSE THE COURT IMPROPERLY RELIED UPON *TRAYNOR v. TURNAGE*, 485 U.S. 535 (1988).

The Fourth Circuit based its decision on its belief that the ADA does not prohibit one disability group from receiving preferential treatment over another disability group. It cited this Court's opinion in *Traynor v. Turnage*, 485 U.S. 535

(1988), in support of this proposition. Amici assert that the Fourth Circuit misconstrued the *Traynor* decision.

Traynor, a case which predated the ADA and was decided under its more narrow precursor, the Rehabilitation Act of 1973,[5] analyzed a challenge to a distinction among veterans receiving certain educational benefits from the federal government. Under a provision enacted by Congress -- not one imposed by a private company-- veterans were permitted to use their benefits for up to ten years from their discharge date.[6] Those veterans who delayed their education because of "a physical or mental disability which was not the result of [their]own willful misconduct" were granted an extension for using the benefits. As a result of the exclusion of individuals who were disabled because of "willful misconduct", individuals diagnosed with "primary alcoholism" were denied the extension.

The distinction was allowed because the veterans denied the extension "are not . . . denied benefits solely by reason of [their] handicap, but because they engaged with some degree of willfulness in the conduct that caused them to become disabled." Id. at 1383. No such basis exists here for excluding Mr. Lewis from receiving his long-term disability benefits. Indeed, the *Traynor* Court cautioned that "[i]t would arguably be inconsistent with § 501 for *Congress* to distinguish between categories of disabled veterans *according to generalized determinations that lack any substantial basis.*"

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[5] In *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), this Court noted that the ADA's anti-discrimination prohibitions are broader than those contained in Section 504 of the Rehabilitation Act of 1973. Id. at 2186,2187.

[6] Unlike the distinction challenged in this case, the provision analyzed in Traynor was part of a law enacted by Congress. "Accordingly, since we are not at liberty to pick and choose among congressional enactments . . . when two statutes are capable of co-existence," the challenged provision was upheld. 108 S. Ct. at 1383-84.

Id. at 1383(emphasis added). See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312.[7]

In *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), this Court last year strongly suggested that *Traynor* should not be interpreted to prevent an individual or a group of individuals within a protected class from asserting an ADA discrimination claim because there were denied benefits available to other members of the protected class. In *Olmstead*, two institutionalized individuals with mental disabilities argued that Title II of the ADA required the state of Georgia to provide them with community placements. The State argued that disparate treatment among members of the same protected class is not actionable under the ADA. This Court rejected that view, asserting that the position stated in the dissent that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of the same group,"...."is incorrect as a matter of precedent and logic." Id. at 2186, n.10.

II. THE DECISION BELOW IMPROPERLY INTERPRETED THE PLAIN MEANING AND LEGISLATIVE HISTORY OF TITLE I AND TITLE V OF THE ADA.

At trial, respondent Kmart offered no evidence of actuarial data or experience in defense of its disability-based limitation in Harold Lewis' long-term disability policy. Despite this, the Fourth Circuit, disregarding the statutory language of the ADA and its legislative history, held that this limitation did not violate Title I of the ADA. By so doing, the

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[7] "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." Id. at 312. (Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq.).

Court failed to recognize that limitations of this sort, when not supported by actuarial data or other experience based evidence, are precisely what the ADA is intended to eliminate.

The plain language and legislative history of the ADA prohibit unjustified discrimination in employer-provided long-term disability insurance policies. Title I of the ADA prohibits employers from discriminating against employees on the basis of disability "in regard to . . . employee compensation, . . . and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a).

Title V, section 501 (the "safe harbor" provision) of the ADA establishes that actuarial justification is required for disability-based limitations in employer-provided insurance policies. This provision delineates the circumstances under which employers may lawfully provide insurance plans that include disability-based distinctions which would otherwise violate the provisions of Title I. Employers are not prohibited from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan *that are based on underwriting risks,* classifying risks, or administering such risks that are based on or not inconsistent with State law," provided that the employer is not engaging in "a subterfuge to evade the purposes of Title I..." 42 U.S.C. § 12201(c)(emphasis added). Thus, under this rule, a disability-based plan term in an employer-provided long-term disability insurance plan must be based on underwriting risks to avoid running afoul of Title I of the Act.

The basic principle that disability-based distinctions in insurance must be justified through actuarial data or other evidence of legitimate risk assessment is clearly outlined in the reports issued by the committees sponsoring the ADA: "Under the ADA, a person with a disability cannot be denied insurance *or be subject to different terms or conditions of*

insurance based on disability alone, *if the disability does not pose increased risks*." House Comm. on Education and Labor, 101st Cong., 2nd Sess., H.R. Rep. No. 101-485(II), p. 136 (1990)(emphasis added).

The legislative history further specifies that to qualify under the exemption for increased underwriting risk, a plan may not rely on mere *speculation* about risk, but must offer *sound actuarial data or experience*:

> [I]nsurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are *based on sound actuarial data and not on speculation* . . . [The] ADA requires that underwriting and classification of risks be *based on sound actuarial principles or be related to actual or reasonably anticipated experience*.

House Comm. on the Judiciary, 101st Cong., 2nd Sess., H.R. Rep. No. 101-485(III), p. 70-71 (1990)(emphasis added).

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is *based on sound actuarial principles or is related to actual or reasonably anticipated experience*.

House Comm. on Education and Labor, 101st Cong., 2nd Sess., H.R. Rep. No. 101-485(II), p. 136 (1990)(emphasis added).

Clearly, Kmart did not provide the evidence at trial that the ADA requires to justify distinctions in long-term disability benefits for persons with mental disabilities.

III. KMART AND ITS INSURANCE INDUSTRY AMICI PROVIDED NO EVIDENCE TO SUPPORT ITS DISCRIMINATORY LONG-TERM DISABILITY POLICY.

Kmart provided no evidence at trial – actuarial or otherwise – in support of the 24 month cap on mental disability benefits in Harold Lewis' long-term disability policy. In contrast, Mr. Lewis provided compelling evidence that the imposition of these caps is unnecessary, is contrary to prevailing scientific evidence, and is grounded in outdated, prejudicial stereotypes about mental illnesses.

1. It is noteworthy that the only expert actuarial testimony at trial was provided by actuary Arthur Anderson on behalf of petitioner Harold Lewis. Mr. Anderson testified that, in his expert opinion, insufficient data exists for companies like Kmart to conclude that costs would increase if two year caps on mental disabilities were lifted from their long-term disability insurance plans. Joint Transcript at 0506, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999). Mr. Anderson also testified that the Diagnostic and Statistical Manual (DSM) is not used in the actuarial field, and consequently there is no information in that field that could be used to evaluate the risks in long-term disability policies associated with all of the conditions named in the DSM.[8]

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[8] The Diagnostic and Statistical Manual – Fourth Edition (DSM-IV) is used by psychiatrists, psychologists, and other mental health practitioners to diagnose and classify a wide range of mental disorders and mental health conditions. Mr. Lewis' long-term disability policy establishes a 24 month limit on benefits for disabilities "caused to any extend by a mental condition (not including alcoholism or any other substance abuse)

2. There is no scientific evidence to support contentions by the insurance industry that caps in long-term disability benefits for people with mental disabilities are necessary because mental disorders are difficult to evaluate and accurately diagnose.[9] Harold Lewis provided extensive testimony at trial that his condition, major depression, can be diagnosed as accurately as other medical disorders.

John Rush, M.D.,[10] a leading national authority on major depression, testified on behalf of Petitioner Harold Lewis at trial. When asked about the reliability of the diagnosis of depression by a qualified psychiatrist, Dr. Rush stated that "the reliability of DSM-IV major depression is on the order of 80 to 85 percent." Joint Trial Exhibit at 0458, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999). When asked how this compared with the diagnosis of conditions not in the DSM, Dr. Rush responded that they are comparable. He referenced a 1993 report published in the *American Journal of Psychiatry* which, relying on a "huge body of evidence", concluded that major mental disorders "can be reliably diagnosed... ." Id.[11]

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described in the most current edition of the DSM." Joint Transcript at 0071, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999).

[9] *Amicus curiae* brief of the American Council of Life Insurers and The Health Insurance Association of America at 20, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999) ("Because mental disability claims are increasingly common and difficult to evaluate, there is a great risk that they will be abused or over-utilized.")

[10] Dr. Rush served as chair of the workgroup which wrote the section on mood disorders for the fourth edition of the Diagnostic and Statistical Manual (DSM-IV), the authoritative source of diagnostic information for psychiatrists and other mental health professionals throughout the United States.

[11] National Advisory Mental Health Council, "Health Care Reform for Americans with Severe Mental Illnesses", 150 *American Journal of Psychiatry* 10: 1447 (Oct. 1993). See, also, Spitzer, Foreman, and Nee,

Dr. Rush also established in his testimony that major depression can be evaluated and studied through a number of laboratory tests that distinguish the brain functions of depressed individuals from those who do not suffer from depression. These laboratory tests include EEG evaluations, functional brain imaging, structural brain imaging (such as MRIs) and endocrine tests. Joint Trial Exhibit at 0459. As with other medical disorders, e.g. heart disease, cancer, and diabetes, clinical depression is diagnosed through both the observation and evaluation of symptoms and through laboratory tests to detect or rule out secondary medical causes.[12]

3. The insurance industry has also rationalized caps on mental disability benefits as necessary to prevent against abuse and over-utilization. This contention is fallacious because most long-term disability policies, including that of Mr. Lewis, contain a number of safeguards against abuse and over-utilization, including progressively stringent eligibility requirements, precise disability evaluation procedures, and periodic re-evaluation requirements.

Mr. Lewis' long-term disability policy with Aetna stipulates that a policy-holder must be certified by Aetna as being disabled from working before qualifying for payments under the plan. During the first 30 months of a disability period, a person qualifies for payments under the plan only if

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"Field Trials for Initial Inter-Rater Diagnostic Reliability," 136 *American Journal of Psychiatry* 6, 815 (1979).

[12] Dr. Rush explained that depression can sometimes be an early symptom of other medical disorders, such as cancer of the pancreas or other endocrine system disorders. In these cases, as with major depression, the signs and symptoms of depression are attributable to changes or impairments in brain functioning. Joint Appendix at 0449, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999).

the person is evaluated as "not able, solely because of disease or injury, to perform the material duties of your own occupation." Joint Appendix at 0068, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999).

After 30 months, the standard to qualify for continuing payments becomes even stricter. The policy holder must be determined to be "not able solely because of disease or injury, to work at *any* reasonable occupation." Id. (emphasis added).

Moreover, to qualify for long-term disability benefits, the Kmart policy requires a policyholder to be under the care of a physician which, in the case of a person asserting a claim based on a condition covered in the DSM, is a psychiatrist. Id. at 0082. Furthermore, the plan vests authority with the insurer to require applicants to submit to an independent medical examination by a physician of its own choosing. Failure to participate in such an examination is per se grounds for denying certification for benefits. Id. at 0068.

These safeguards clearly place responsibility on policyholders like Mr. Lewis to demonstrate that they are truly disabled from working, and thereby minimize the chances that someone will be found eligible for benefits who is not qualified.

Finally, as an additional safeguard against abuse of long-term disability benefits, Kmart's policy requires beneficiaries to be periodically re-certified to ensure that they still qualify for benefits. Under the terms of the plan, the initial determination of eligibility for benefits need not be for an indefinite time period. Rather, the plan affords Aetna with complete discretion to certify benefits for a fixed period of time only, and to require beneficiaries to be periodically reevaluated for continuing eligibility.

IV. UNJUSTIFIED CAPS IN LONG-TERM DISABILITY BENEFITS FOR MENTAL DISABILITIES ARE BASED ON STIGMA AND PREJUDICE, ARE HARMFUL TO PERSONS WITH MENTAL DISABILITIES AND ARE CONTRARY TO THE PUBLIC INTEREST.

1. The imposition of arbitrary and discriminatory caps on benefits for persons with mental disabilities reflects long-standing stigma and discriminatory attitudes towards people who suffer from these disorders.

Historically, stigma towards those who suffer from serious mental illnesses has been pervasive. For example, it was once thought that mental illness was related to being possessed with demons.[13] While such concepts are no longer prevalent, people suffering from major depression and other mental illnesses are still largely viewed as weak, products of poor upbringing, and responsible for their own plight.

In the past, widespread stigma and misunderstanding towards those with mental illnesses resulted in the subhuman treatment of those who suffered from these disorders.[14] Today, this stigma is manifest in discrimination of a far more subtle form that is nevertheless very damaging to the recovery of people who suffer from these illnesses. People with mental illnesses frequently experience discrimination in all areas of their lives, including housing,[15] employment,[16] voting[17] and insurance.[18]

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[13] *See* O. WAHL, TELLING IS RISKY BUSINESS, 14-15 (In Press); see, also, G.N. GROB, A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL, 10 (1993).

[14] O. Wahl, Id.

[15] S. Page, *Effects of the Mental Illness Label in Attempts to Obtain Accommodation,* 9 CANADIAN JOURNAL OF BEHAVIORAL SCIENCE, 84 (1977).

The devastating and pervasive effects of stigma on the lives of persons with mental illnesses is emphasized in the comprehensive report on mental health and mental illness in America recently released by the Surgeon General of the United States:

> Stigma leads others to avoid living, socializing, or working with, renting to, or employing people with mental disorders ... [i]t reduces patients' access to resources and opportunities, (e.g. housing, jobs) and leads to low self-esteem, isolation, and hopelessness. It deters the public from seeking, and wanting to pay for, care. In its most overt and egregious form, stigma results in outright discrimination and abuse. More tragically, it deprives people of their dignity and interferes with their full participation in society.

U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* at 6 (1999).

Two well-known psychiatrists, Paul Jay Fink and William R. Dubin, have written that scientific advances in

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[16] Office of Technology Assessment, "Psychiatric Disabilities, Employment, and the Americans with Disabilities Act," 8 (1994); ("By disclosing a psychiatric disability, an individual risks discrimination, teasing, or harassment, isolation, stigmatizing assumptions about his or her ability, and the labeling of all behavior and emotions as pathological").

[17] Martha T. Moore, *Maine Initiative Would Give The Vote To All Mentally Ill*, USA TODAY, October 30, 1997.

[18] B. Shannon, *The Brain Gets Sick Too: The Case For Equal Coverage For Serious Mental Illness*, 24 ST. MARY'S L.J. 365, 365-398 (1993); R. Honberg and L.L. Hall, *A Question Of Fairness: Equal Coverage Of Severe Mental Illness In Health Insurance*, 6 DISABILITY LAW REPORTER 1, 12 (November, 1996).

diagnosing and treating mental illnesses have far outdistanced recognition of these illnesses as biological disorders of the brain among the American public:

> There is vast ignorance in the public sector as to the advances that have been made in psychiatry, which in combination with the pervasive stigma would prevent people from seeking and obtaining help. Additionally, the myth that there is something about the American character that says we should have strength to be able to take care of ourselves continues to take precedence over the concept that mental illness is a biological illness which is treatable and not self-induced.

W.R. Dubin and P.J. Fink, *Effects of Stigma on Psychiatric Treatment* in STIGMA AND MENTAL ILLNESS at 4 (P. Fink and A. Tasman, eds., 1992).

Although there are notable exceptions, many employer-provided long-term disability plans impose limitations on benefits for people with mental disabilities that are not imposed on other beneficiaries of these plans.[19] While

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[19] Aetna, the insurance company with whom Kmart contracted for the long-term disability policy in question, provides long-term disability plans with no caps on benefits for persons with mental disabilities to at least two employers with more subscribers than Kmart's plan, one with 80,000 subscribers, the other with 30,000 subscribers. Joint Appendix at 0506, *Lewis v. Kmart*, Id. Additionally, at least two other cases involving challenges brought under the ADA to caps on mental disability benefits in long-term disability policies have been settled after employers agreed to provide uncapped plans. *Leonard F. v. Israel Discount Bank*, Civ. Act. 95-6964 (So. Dist., N.Y., Feb. 17, 1998) (settlement agreement and stipulation of dismissal). See also *Harris v. City of Phoenix*, Civ. Act. 95-0361 (Dist. Ct. Az., May 1, 1996) (consent decree abandoning differential in mental and physical disability benefits).

the insurance industry may claim that these caps are necessary to ensure the financial viability of these plans, to date, to the best of *amici's* knowledge, not one insurance company or employer whose plan has been questioned has provided evidence to substantiate these claims. Limitations on benefits for mental disabilities in these plans can therefore only be based on prejudice and stigma.

2. Discriminatory limits on benefits for persons with mental disabilities impact in a profoundly negative way on the recovery of individuals forced to leave work due to major depression or other serious mental disabilities.[20] This negative impact extends far beyond the devastating economic circumstances for the individual and that person's family. Without a stable stream of income derived from these benefits, individuals may be forced to forego desperately needed care, or they may be forced to seek care from inadequately financed public systems of care.

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[20] Prior to trial, Michael R. Hryvniak, M.D., Mr. Lewis' treating psychiatrist, provided an affidavit in which he spoke of his concerns that the loss of long-term disability benefits would exacerbate his patient's condition. "I would be seriously worried about his state of mind, and possibly his actions, were he to suffer a substantial setback in his ability as, for example, by becoming unable to provide sufficient income for the family to maintain its modest lifestyle." Joint Appendix, Vol. II at 0607, *Lewis v. Kmart,* Id.

CONCLUSION

The Americans with Disabilities Act was enacted to protect people with disabilities from unjustified discrimination. Employers with long-term disability polices containing caps on benefits for persons with mental disabilities and the insurance companies they contract with have never provided justification for these restrictive disability-based limitations. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERIC L. SIEGEL
COUNSEL OF RECORD
THE SIEGEL LAW FIRM
1730 K STREET, N.W.
SUITE 1107
WASHINGTON, D.C. 20006-3868
202-955-3012

RONALD S. HONBERG
NATIONAL ALLIANCE FOR
THE MENTALLY ILL
200 NORTH GLEBE ROAD
SUITE 1015
ARLINGTON, VA 22203-3754
703-524-7600

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